

VERBATIM ¹RECORD OF TRIAL ²

(and accompanying papers)

of

MANNING, Bradley E.

(Name: Last, First, Middle Initial)

Headquarters and
Headquarters Company,
United States Army Garrison
(Unit/Command Name)

(Social Security Number)

U.S. Army

(Branch of Service)

PFC/E-3

(Rank)

Fort Myer, VA 22211

(Station or Ship)

By

GENERALCOURT-MARTIALConvened by Commander

(Title of Convening Authority)

UNITED STATES ARMY MILITARY DISTRICT OF WASHINGTON

(Unit/Command of Convening Authority)

Tried at

Fort Meade, MD

(Place or Places of Trial)

on

see below

(Date or Dates of Trial)

Date or Dates of Trial:

23 February 2012, 15-16 March 2012, 24-26 April 2012, 6-8 June 2012, 25 June 2012, 16-19 July 2012, 28-30 August 2012, 2 October 2012, 12 October 2012, 17-18 October 2012, 7-8 November 2012, 27 November - 2 December 2012, 5-7 December 2012, 10-11 December 2012, 8-9 January 2013, 16 January 2013, 26 February - 1 March 2013, 8 March 2013, 10 April 2013, 7-8 May 2013, 21 May 2013, 3-5 June 2013, 10-12 June 2013, 17-18 June 2013, 25-28 June 2013, 1-2 July 2013, 8-10 July 2013, 15 July 2013, 18-19 July 2013, 25-26 July 2013, 28 July - 2 August 2013, 5-9 August 2013, 12-14 August 2013, 16 August 2013, and 19-21 August 2013.

¹ Insert "verbatim" or "summarized" as appropriate. (This form will be used by the Army and Navy for verbatim records of trial only.)

² See inside back cover for instructions as to preparation and arrangement.

1 TC[MAJ FEIN]: For now -- okay, Your Honor, this would be for
2 R.C.M. 707 excludable delay, so pre-referral.

3 MJ: All right, I'm looking at Enclosure 11.

4 TC[MAJ FEIN]: Yes, Your Honor. So as the ----

5 MJ: And we had the 706 and some of that period's already been
6 -- the parties have agreed that that's going to be excluded; is that
7 right? It's just that last month -- the first piece of it before the
8 706 board was appointed and the portion at the end, March to April;
9 is that right?

10 CDC[MR. COOMBS]: That is correct, Your Honor.

11 MJ: The period ----

12 TC[MAJ FEIN]: Yes, Your Honor.

13 MJ: ---- in the beginning, okay.

14 TC[MAJ FEIN]: So -- excuse me, Your Honor. I'm actually
15 starting at page 10 of the enclosure. Page 10 is the first
16 memorandum signed by me to the convening authority requesting ----

17 MJ: And this is Enclosure 11 or Enclosure 12?

18 TC[MAJ FEIN]: Enclosure 11, Your Honor.

19 MJ: Okay, they're not numbered, so let me [perusing document]
20 -- okay, got it.

21 TC[MAJ FEIN]: So, Your Honor, the real focus of the main reason
22 for delay after the 706 was completed was to provide -- receive the
23 proper approvals to receive evidence to disclose to the defense in

1 order to move to the Article 32. Now that evidence included
2 classification reviews, but that is only one piece of all the
3 evidence that was included; and as the court reviews these documents
4 moving forward, there's many reasons that are included and these
5 witnesses don't necessarily speak to that information that was
6 presented to the convening authority to make that decision.

7 MJ: And what -- the government's calling three witnesses.

8 TC[MAJ FEIN]: Yes, Your Honor.

9 MJ: And those three witnesses are going to be able to explain
10 all of this to me so I understand it?

11 TC[MAJ FEIN]: Well, no, Your Honor. The government's position
12 is, is that the government, of course, bearing the burden has to
13 provide the evidence to the court. The evidence comes in many forms.
14 The first form already presented to the court is documentary
15 evidence. Both the memorandums that were signed the defense has been
16 in possession of since they were actually sent to the convening
17 authority. There are e-mails that capture this information that have
18 been presented to the court and there will be testimony. There's
19 three main sources of evidence for this motions hearing.

20 MJ: Is this witness that you're talking about going to
21 describe or at least provide evidence of what is required to get
22 approval to release classified information from the defense?

1 TC[MAJ FEIN]: Yes, Your Honor. He's a -- Mr. Haggett is a
2 subject matter expert for the Department of the Army, who would --
3 who we intend to offer to explain why -- what procedures are
4 typically in place within the United States Government that are
5 common across the Government; why those procedures are followed.
6 Much of what we've already discussed on the record in this case about
7 interagency coordination, how documents are reviewed, he's an expert
8 in this field and will be able to explain that to the court as an
9 example. He is familiar also with much of the classified information
10 in this case because he actually did review the Army CID unclassified
11 case file as part of this case prior to turning it over in discovery.

12 MJ: Is he going to be capable of telling me, because we do
13 have, I'm looking here on the dates -- what drove the train with the
14 Article 32 was the classification reviews coming in, in November of
15 2011; is that right?

16 TC[MAJ FEIN]: Your Honor, there's no question that the very
17 last -- the very -- essentially we have a gate with many keys to
18 unlock -- or many locks on the gate and there were a lot there and
19 the very last key right there at the end of November was the very
20 last classification review for one of the charged documents, so one
21 of -- not other classification reviews, and I'll explain this in a
22 moment. There's a -- I think there's, rightfully so, confusion on
23 this term of classification, but for the charged documents, the

1 documents that Private First Class Manning has been charged with
2 compromising as part of -- under 18 U.S.C. 793 or 18 U.S.C. 1030 that
3 have been alleged as classified, the government has the burden and we
4 would argue before the Article 32 or at the Article 32 to prove they
5 were classified; so although the defense has explained different
6 possibilities the government would have to offer that evidence going
7 forward, but it had to be reviewed to make that determination. Now
8 whether it was in written form or oral testimony, someone or
9 something had to be presented to a 32 officer; otherwise, we wouldn't
10 have met our minimal burden of proving it wasn't classified, and
11 that's why those classification reviews were done prior to the 32.

12 MJ: Would the information have been classified at the time of
13 the disclosure?

14 TC[MAJ FEIN]: Well actually that's what the classification
15 reviews and ultimately at trial the OCA testimony or their
16 representative will say ----

17 MJ: I guess where I'm confused here is they're doing this
18 review after the fact.

19 TC[MAJ FEIN]: Yes, ma'am.

20 MJ: If it were classified at the time of disclosure, wouldn't
21 somebody have had to classify them before they were disclosed?

22 TC[MAJ FEIN]: Well, yes, ma'am, and they were and they were
23 marked classified at the time, but what isn't done and isn't required

1 under the rules is every time a document is produced and it's marked
2 classified that a full on classification review is done of that
3 document at the time; otherwise, pretty much the entire government
4 would stop when dealing with classified information. The rules under
5 Executive Order 13526 and other promulgated rules and the regulations
6 from there explain how your derivative classification authority, how
7 there are security classification guides that allow users or at the
8 lowest level, like Private First Class Manning as an intel analyst
9 downrange or like the parties to this case, the prosecution who puts
10 together a derivatively classified document, we do that but it
11 doesn't necessarily mean by law that document is classified if it was
12 to be compromised. So we have the burden, the government, because of
13 the way it's been alleged and because it's a violation of 793 and
14 1030 to prove, in fact, it is classified; and the way to do that is a
15 component authority has to review it and make that determination. It
16 is a backward-looking determination, ----

17 MJ: Is there ----

18 TC[MAJ FEIN]: ---- but it is one.

19 MJ: ---- something in the law or regulations that can tell me
20 that?

21 TC[MAJ FEIN]: Absolutely, Your Honor.

22 MJ: And you're going to present that; that's something that's
23 going to be part of your case when we get to the actual motion?

1 TC[MAJ FEIN]: Yes, Your Honor. It's already been provided in
2 previous appellate exhibits, but also it's part of Mr. Haggett's
3 testimony as an expert on Army Regulation 380-5.

4 MJ: Okay. Let me ask you a question. The -- this Mr.
5 Haggett, is he going to be able to say -- well, first of all, let me
6 just ask the government a proffer question. The government has given
7 me documents, dated, I believe, 18 March, of initial classification
8 memorandums for OCA reviews -- maybe 18 March is wrong, yeah -- no.
9 It's 18 March 2011, where they do say under purpose to finalize and
10 "finalize" is in italics.

11 TC[MAJ FEIN]: Yes, Your Honor.

12 MJ: Were there documentation -- was there documentation sent
13 out before this from the government to initiate a review or not?

14 TC[MAJ FEIN]: No, Your Honor. As a way of proffer, there was
15 no formal documentation sent out. What's been explained in the
16 government's due diligence filing that the defense has had access to
17 at this point is that there -- after -- because of the investigation
18 of the crime, the ongoing leaks that occurred at the same time of the
19 investigation, there was a period of time in the fall of 2010 that
20 the prosecution, law enforcement, and the affected government -- the
21 victim agencies had to figure out which classified information was
22 actually being compromised or not, and once that was done, they
23 started going through the approval process to figure out what could

1 be used for trial or not. At the exact that -- part of that process
2 was doing initial reviews to figure out what the classification is.

3 MJ: And that's all in your three volumes of enclosures in
4 your motion?

5 TC[MAJ FEIN]: Many -- many of it, Your Honor, is captured.
6 Enclosure 1 and Enclosure 2 is -- it's approximately 1500
7 unclassified e-mails and about between 2- and 300 classified e-mails
8 that the court and the defense has to show -- it does reflect a lot
9 of this activity. It's a sampling. We say that because we'd
10 essentially be producing approximately 40,000 e-mails that we've
11 reviewed for this purpose if we produced everything, so we have
12 provided samplings and we reference them throughout the motion but
13 we've also done that to -- in order to highlight this activity. It's
14 not just a proffer. Here are the e-mails talking about it; here's
15 the e-mails from the Department of State saying these are the
16 documents.

17 MJ: Well let me ask you a question on that. I notice when
18 I'm going through some of these e-mails that they're redacted.

19 TC[MAJ FEIN]: Yes, Your Honor.

20 MJ: Are they redact -- are all my copies redacted too?

21 TC[MAJ FEIN]: Well, Your Honor, the individual names are
22 redacted but not the organizations that it belongs to, so it's still

23 ----

1 MJ: I understand, but a lot of the body on some of these
2 e-mails is redacted.

3 TC[MAJ FEIN]: Well, yes, ma'am. We've redacted the -- what we
4 would say that is irrelevant to speedy trial portions or if it's
5 classified material we don't have authority to use even for speedy
6 trial purposes.

7 MJ: Okay. Will this Mr. Haggett be able to testify because
8 the -- we've got the 18 March 2011 documents going out to these
9 various OCAs and they except for -- at least from what I've seen from
10 CYBERCOM that apparently came in July of 2011, the rest of them came
11 in November; is that right?

12 TC[MAJ FEIN]: Yes, Your Honor, and we have -- I mean, what's
13 already been part of the appellate record and the defense has had is
14 the actual documents themselves with dates on them as they've already
15 referenced, so ----

16 MJ: Are those dates that they arrived in November of 2011?

17 TC[MAJ FEIN]: Your Honor, they arrived, I think, in a rolling
18 period between September and November, and then the last one arrived
19 I think it was December 1st of 2011.

20 MJ: What about the 12 January 2012 that defense is
21 referencing?

22 TC[MAJ FEIN]: Yes, Your Honor. What the defense cherry-picked
23 out of the actual government's filing was -- last night in their

1 filing was when they were given the produced version of it in
2 classified -- or an unclassified discovery, that document was dated
3 15 December, the Article 32 started 16 December, and in our actual
4 reply -- or, excuse me, our response to the court, we specifically
5 state that. It was completed 15 December and the next day was used
6 during the Article 32 investigation. That was for the Intelink logs
7 from the ODNI and that was used so we'd know if we needed to close
8 the hearing or not.

9 And, Your Honor, this would be a good time to explain the
10 three types of the term "classification review" to help the court,
11 and possibly the defense, who has not asked for this at this point,
12 but the term "classification review" in general is exactly what it
13 sounds like, but in this case, there have been three different uses
14 of the term. The formal classification reviews used for the charged
15 documents, these are the formal declarations that are signed under
16 the penalty of perjury that the defense has had in their possession
17 since before the Article 32 are those documents that the government
18 relied upon at the Article 32 to prove that the information was
19 classified at the time of the compromise as an element of the
20 offenses that PFC Manning is charged with.

21 There is also some classification reviews that are more
22 formal but not necessarily declarations or affidavits, like the ODNI
23 or like even CYBERCOM or DISA, that are not for charged documents but

1 other evidence that the government intends to use. Those are done
2 solely for the purpose of knowing how to properly handle or use
3 evidence. There was no -- and it is nowhere in the record because it
4 did not happen were any of those the basis of any delay. It was the
5 charged documents, and that actually is outlined in every single memo
6 that the prosecution, again Enclosure 11 to the government's reply or
7 response to the speedy trial motion, the government outlined to the
8 defense and to the convening authority that we were working on
9 getting the charged document classification reviews.

10 MJ: The defense wants -- well, first of all, let me ask the
11 government a question. I asked the defense -- I mean, normally in a
12 case, at least one that's ever been before me, if someone gets up and
13 says, "I haven't talked to these people," I say, "That's it; fine.
14 Go talk to them and then come back to me and we'll talk further if
15 you want these people produced based on Rockwood; that not only just
16 what topic they're talking about but what they're going to say about
17 the topic has to be shown for relevance and necessity."

18 Now in this case scenario, I know that you've had some
19 Touhy issues and all the rest of that, if the defense, say, called
20 somebody from these OCAs, would they be getting Touhy requests and
21 all of that or would somebody from these OCAs be talking to the
22 defense and giving them the information they want?

1 TC[MAJ FEIN]: Your Honor, unfortunately I can't answer that
2 right now without talking to the different organizations. The
3 prosecution has no control over the law of Touhy, both federal law
4 and the case Touhy and its application, but what I can say is we
5 haven't addressed that; we've never been asked.

6 For most of these questions, and I know we're about --
7 we'll start going through each one, I mean, the majority of these
8 questions being asked have already been answered in our filings, in
9 our e-mails, in our chronology. They are questions on what the
10 prosecution did because it's based off the prosecution's diligence.
11 Someone from another agency doesn't need to be called, the receiver
12 of the information, when we've already presented it to the court, not
13 just in a proffer but with actual evidence.

14 MJ: Well, I've got what you did. I've got the, I believe
15 it's Enclosure -- I think it was 20 or 21, the OCA review request and
16 the follow-ons to the September and October [pause] -- I understand
17 the government's position is that it's not responsible for what other
18 agencies do but its reaction to delay by other agencies is relevant
19 to speedy trial, so ----

20 TC[MAJ FEIN]: Yes, Your Honor.

21 MJ: ---- what evidence am I going to have of why it took
22 these entities from March of 2011 until November 2011 to produce
23 these classification reviews?

1 TC[MAJ FEIN]: Well I guess I might not understand your question
2 completely. The first part, as I understood it, is the government's
3 position is -- well, first, the reasonableness decision that a
4 convening authority is judged by with the court ----

5 MJ: Is abuse of discretion.

6 TC[MAJ FEIN]: ---- is abuse of discretion, but that
7 reasonableness isn't of what anyone else is doing; it's what -- the
8 decision of the convening authority. So for the pre-referral --
9 pre-referral delay under R.C.M. 707, the focus should be on the
10 convening authority and what information the convening authority
11 received and whether his decision, in this case Colonel's Coffman's,
12 was reasonable or not.

13 MJ: Uh-huh **[affirmative response]**. That's for R.C.M. 707.

14 TC[MAJ FEIN]: Yes, Your Honor, so for Article 10, the
15 government does disagree, and this is why we're here to litigate this
16 issue; that what the other agencies do or don't do is not -- should
17 not be viewed by the court in making a diligence decision, as I think
18 the court just said. It should be on what the prosecution did in
19 order to ensure they were doing what they needed to do. Even in the
20 case cited by the -- the only case cited by the defense on this
21 issue, Your Honor, *Pyburn*, the defense conveniently leaves out in
22 their block quotation from last night's motion the very next line of
23 *Pyburn* where it talks about the type of evidence and then it -- the

1 court holds "We do find a lack of diligence on his part," the
2 investigating officer, "as well as the members of the prosecution..."
3 They don't make a diligence determination on what the laboratory did.
4 It's on what the prosecution, or if it was a delegated task -- or
5 delegated authority to the IO.

6 MJ: But I guess what I'm looking at here and I think what the
7 defense is trying to build is if it would normally take a week to do
8 a classification review and an agency says, "Well, this is low on my
9 list of priorities so I'm going to put it off for 10 months," then at
10 what point if the government knows that it only takes a week to do a
11 classification review, does one have to do more than send letters for
12 diligence?

13 TC[MAJ FEIN]: Your Honor, I ----

14 MJ: And how would I know that, whether it takes a week or a
15 month or 6 months or 9 months to do a classification review?

16 TC[MAJ FEIN]: Well, Your Honor, and that's why the government
17 offers Mr. Haggett as a SME on the general process he's followed
18 across the intelligence community. He's been part of this community
19 and does this for a living, to be able to explain that without having
20 to get each individual agency in to explain their own intricate
21 deliberative processes of how they would do it. The government would
22 offer the defense has provided no evidence that would even support
23 that notion that the court came up with or any other notion other

1 than conjecture. What the evidence the prosecution has offered
2 already to the court is -- for diligence is that the prosecution
3 continually followed up with these individuals, we did it both
4 formally and over the phone and over e-mail, followed up with the
5 individuals to get an update.

6 MJ: Where -- is there something in your motion -- I know your
7 motion had you went to each of the different people. Is there
8 something in your filing that tells me everything that government did
9 -- well it basically answers the questions that the defense has in
10 their list in one place so I don't have to go looking for e-mail
11 00573 in five volumes.

12 TC[MAJ FEIN]: Your Honor, we think that, yes, it would be our
13 due diligence filing because the court asked the same questions and
14 we answered them. The defense has had it, yet they still say they
15 want those answers. We've provided it; we proffered it; it's ours.
16 I mean, again, as you said before to the defense, a proffer isn't
17 necessarily evidence unless there's something to the contrary. If
18 the issue is the weight of that, I mean the prosecution could sign an
19 affidavit and submit that to the court to say these are, in fact,
20 under penalty of perjury, these are the dates we did this; and plus
21 we've provided the majority of the e-mails that cover those dates as
22 well; all that has been provided. But for the affidavit or
23 testimony, all those answers -- all -- not all, Your Honor, and we'll

1 go through this in a moment. The last few questions about the inner
2 workings of the agencies, those weren't answered, but all the other
3 questions about when the prosecution did something and when the
4 prosecution received, those have all been answered already.

5 And to make this easy -- probably easier for all, Your
6 Honor, we can go through and segregate e-mails, segregate -- we can
7 make buckets of all our enclosures by agency. The government can do
8 that.

9 MJ: A lot of that would be helpful to the court. I know I've
10 spent a lot of time over the last few weeks going through volumes and
11 volumes of information and it's not easy to do, ----

12 TC[MAJ FEIN]: Yes, ma'am.

13 MJ: ---- so that would be incredibly helpful.

14 TC[MAJ FEIN]: Yes, ma'am. So, ma'am, if now's a good time we
15 could start going down the list.

16 MJ: Let's do it.

17 TC[MAJ FEIN]: Yes, ma'am.

18 The first witness the defense is requesting, Your Honor,
19 is Sergeant -- now Master Sergeant Carlile. First and foremost, even
20 going off what the defense has written, the only reason it appears
21 the defense wants Master Sergeant Carlile is simply for her to
22 explain why she signed for Colonel Coffman. Colonel Coffman will be
23 testifying.

1 MJ: Is Master Sergeant Carlile still here at MDW?

2 TC[MAJ FEIN]: No, Your Honor. Actually, she was only detailed
3 over for 6 months. She has PCS'd out of the area. She's at Fort
4 Gordon, I think.

5 MJ: All right, do you have contact information for her?

6 TC[MAJ FEIN]: We do, Your Honor.

7 MJ: Can you get her linked up with the defense so the defense
8 can talk to her?

9 TC[MAJ FEIN]: We can, Your Honor.

10 MJ: All right.

11 TC[MAJ FEIN]: And ----

12 MJ: I'll rule on her right now. She's not -- I'm not
13 compelling her until the defense talks to her and proffers to me what
14 she's going to say, okay.

15 TC[MAJ FEIN]: And, Your Honor, just in case that, again,
16 happens over e-mail, we would just say she wasn't delegated signature
17 authority under 25-50, if that's what the defense is -- seems to be
18 alluding to; she simply signed for, which means that she had the
19 authority based off being told orally sign that document for me, not
20 delegated the authority on an authority line to sign instead of.

21 MJ: Okay. Well, I mean, you have the -- Colonel Coffman is
22 coming in, so he can testify as to what authority she had, he gave
23 her, and all the rest of that. I mean if you talk to her, Mr.

1 Coombs, and she comes back and says, "Oh, I had carte blanche
2 authority to sign whatever I wanted and I decided whether the delay
3 was approved or not," then I'll certainly be reconsidering.

4 CDC[MR. COOMBS]: Yes, Your Honor.

5 TC[MAJ FEIN]: Your Honor, next, Dr. Sweda.

6 MJ: Okay.

7 TC[MAJ FEIN]: Your Honor, first and foremost, all the
8 information that the defense is -- seems to be wanting to call Dr.
9 Sweda for is already in the record. The defense were on all the
10 e-mails and all the filings that Dr. Sweda submitted with all of his
11 reasonings and responses and requests, both formal memorandum that
12 the prosecution's offered to the court and the e-mails; all that
13 information is already provided. The government does contest the
14 recollection of the events that the defense has told the court
15 earlier and I understand in the reply they, last night, are trying to
16 outline one issue versus another, so now we'll provide even more
17 e-mails to the court to show the full picture.

18 But specifically today it was said on the record for Dr.
19 Sweda what they were doing between August and December, for more than
20 3 months, and why there wasn't a board. Well, again, that's
21 argument; there's no facts to support that. The facts that support
22 that are the defense requested based off the classification or
23 proposed classification that the board members all have certain

1 clearance levels. There's no reason a board would be selected if the
2 person didn't have the right clearance. They would be doing nothing
3 else because of the clearance, so the board wasn't selected until the
4 clearance levels were figured out; otherwise, a whole new board would
5 have to be -- would have to be ----

6 MJ: Does Dr. Sweda have any play in the clearance issue or
7 who gets clearances or who is cleared or who isn't cleared? I mean,
8 who made that decision on who was going to be on the board?

9 TC[MAJ FEIN]: Well, Your Honor, Dr. Sweda is the president of
10 the board and does select the board members at Walter Reed or then
11 Walter Reed. He does make the selection, and I can proffer now and
12 there's e-mails that we have produced as part of Enclosure 1 that
13 show the government reaching out to Dr. Sweda about clearances; he
14 finding doctors that have -- the doctors that fit the portfolio that
15 the defense requested because they had the three doctors, a certain
16 type of degrees and the very special kind that the defense wanted
17 they found and then started working the clearances once we knew what
18 clearance to obtain; didn't know that until the end of December.

19 But, again, that's all the documentation the defense
20 already has and are now just using at argument to say the facts don't
21 exist, and that has been provided to the court in the government's
22 response.

23 MJ: All right.

1 TC[MAJ FEIN]: Your Honor, for original classification
2 authorities, so this still is talking 707 pre-referral, pre-
3 arraignment ----
4 MJ: Well before you get there, this Dr. Sweda, where is he
5 now?
6 TC[MAJ FEIN]: Your Honor, he's at the new Walter Reed.
7 MJ: All right. Any reason he won't -- he wouldn't talk to
8 Mr. Coombs if Mr. Coombs went over there and talked to him?
9 TC[MAJ FEIN]: Not that we know of, Your Honor. We reached out
10 to him and he spoke to us in preparation for this.
11 MJ: Once again, let's arrange that.
12 Mr. Coombs, go talk to him. If he's got something
13 relevant to say, then come back to me.
14 CDC[MR. COOMBS]: Yes, Your Honor.
15 TC[MAJ FEIN]: Your Honor, for the original classification
16 authorities pre-arraignment, the government offers that the key here,
17 again, is this was excludable delay under R.C.M. 707(charlie) and
18 that is the convening authority's decision to exclude the delay
19 whether that decision was reasonable, not whether what the OCAs did
20 were reasonable.
21 MJ: That's for R.C.M. 707.

1 TC[MAJ FEIN]: Yes, Your Honor. And I'm just breaking it down
2 the same way the defense just did. They said pre-arraignment OCAs,
3 these OCAs, so, yes, Your Honor.

4 First and foremost, and I mentioned this earlier, the
5 first five questions but it's the first part of the fifth question
6 have all been answered by the government; originally answered in due
7 diligence filing and then also answered now in the response.

8 MJ: That's Enclosure 57?

9 TC[MAJ FEIN]: Yes, Your Honor. We don't -- it's classified,
10 Your Honor, so we don't have it here.

11 The second part of question 5 that was not answered on
12 why it took this length of time at the different agencies ----

13 MJ: Let me ask you a quick question on number -- the
14 defense's questions there. In the due diligence filing, are they
15 answered in that regard, you know, when did the government first
16 contact the OCAs; is that clear it was on A, B, C, D, and E day,
17 reference by e-mail this, e-mail that?

18 TC[MAJ FEIN]: No, Your Honor. It's not that clear.

19 MJ: Can it be?

20 TC[MAJ FEIN]: Yes, Your Honor, it can be.

21 MJ: That's sort of what you were saying before. If there's
22 some way to put entity by entity that would certainly help me make a
23 decision on this issue.

1 TC[MAJ FEIN]: Yes, Your Honor. I mean that can be done, Your
2 Honor; exactly the same format as the defense. Well, Your Honor,
3 only up to the first part of question 5. The second part of question
4 5, the why it took this length of time, that is not included. Again,
5 we would offer that the prosecution -- that the law supports the
6 prosecution's diligence and how we kept ping-pong them. And the reason
7 the government keeps saying this in a vacuum, Your Honor, if the only
8 -- we go back to the gate that has seven locks. If the only lock
9 there was, was classification reviews and that was all that was going
10 on, which is actually the two cases the pros -- the defense offers as
11 the case law support is that the first one, the 707 case, Kuelker, is
12 a clock restart case that on its face begs questions of what did the
13 government do; preferred charges, the same day refers charges. I
14 think it's 5 days later issues a subpoena to a federal government
15 agency, the Treasury, and then there's apparently no activity at all
16 for that entire period of time. Once they received the information,
17 after the New Year, they then dismissed the case, re-prefer,
18 re-refer, and go forward.

19 MJ: I guess the concern that I have -- I mean I see the
20 government -- I see both sides' positions and you're going to argue
21 those next week, but why it took this length of time? I mean one of
22 the findings I'm going to have to make is whether it was an
23 inordinate delay or not, ----

1 TC[MAJ FEIN]: Yes, Your Honor.

2 MJ: ---- so whether that agency dithered is potentially
3 relevant. Say I would find that the agency did. It takes a week to
4 make a classification review and 11 months later here it comes; then
5 the question would become what did the government do about that and
6 then in the big piece of the pie, does that mean it's a little sliver
7 and the government was busy doing 99 other things at the same time
8 and balance that to weight. I mean all of those things are relevant,
9 but how am I going to know the answer to why it took that length of
10 time if these witnesses aren't called?

11 TC[MAJ FEIN]: Well, Your Honor, so, I guess, just going back to
12 what you just said, speedy trial should be the entire pie, ----

13 MJ: Uh-huh **[affirmative response]**.

14 TC[MAJ FEIN]: ---- not just one piece -- one sliver of one
15 piece, so the government is coordinating with an agency for
16 classification review; and even more importantly, Your Honor, to go
17 back to classification reviews were part of a bigger piece of the
18 pie; a bigger piece of the pie was disclosure of evidence needed to
19 go forward. This is an evidentiary issue. It's not an
20 administrative classification review issue. The government needed
21 the evidence, the critical evidence -- the most critical evidence for
22 12 specifications on the charge sheet to go forward; whether
23 something was or was not classified. So we're talking about an

1 evidentiary issue, both the disclosure issue, because that's as you
2 see from the request that the government has submitted, we had to
3 work through disclosure authority to disclose and the classification
4 review, but again that's part of a little larger piece that the court
5 is viewing -- should be viewing for both 707 and ultimately due
6 diligence, reasonable diligence, the entire pie, so that's why the
7 government contends there's no case law that supports what another
8 agency does or doesn't do internally is relevant to that
9 determination. What is relevant is what we did.

10 MJ: What if it takes the agency -- what if it takes the
11 agency 5 years, 10 years?

12 TC[MAJ FEIN]: Well, Your Honor, I think if the agency took 10
13 years, first, there's a lot of factors. First, the importance of the
14 evidence based off the charged -- the misconduct, the charged
15 offense, and the evidence. If it took some reason 5 years and that
16 is the only reason there is a delay, then I think absolutely probably
17 at that point, under those facts, what the agency did or didn't do is
18 absolutely relevant, and I think the court talked about that,
19 essentially, in Kuelker. The government's position in that case is
20 that I think it's 61 days of delay because they needed those lab
21 results for the rape case, but the court even held that the major --
22 the court specifically held [pause] -- I'm sorry, Your Honor. It's
23 Pyburn, the -- is that nevertheless other strong evidence of guilt

1 was available to the government for the Article 32, so solely waiting
2 for the results from the forensic lab wasn't such a great piece of
3 evidence; wasn't such an important piece of evidence to the case.
4 But I go back to if it took 5 years, Your Honor, because of some
5 unforeseen reason that was the only reason for the delay, I think at
6 that point, yes, it could be relevant, but that's not the facts in
7 this case. The facts in this case are many different activities were
8 going on concurrently up until that point and I think it's around
9 16 November of when it was the very last classification review that
10 had to come in for one set of charged documents, and that was all
11 that was remaining except a 30-day window for the OPLAN Bravo
12 execution, but that was the last lock on the gate. The second that
13 went unlocked we could go forward based off the charges on the charge
14 sheet. But this is an evidentiary issue. This goes back to the
15 weight of the evidence, and in this case, it's the -- it is the major
16 piece of evidence, the actual charged classified documents.

17 And, I'm sorry, Your Honor, just a little aside, but to
18 answer one of the very specific issues the defense brought out to the
19 court, another reason to have these OCAs, is why couldn't the
20 government have gone forward? There's no case law to support the
21 classification reviews. Well there's plenty of case law to support
22 but the government has to have evidence to move forward -- to move
23 forward. It doesn't necessarily have to and the government's not

1 contending it has to be a written classification of your declaration,
2 but as I alluded to earlier, in order to have someone testify even as
3 the defense offered in their response or reply that someone -- an OCA
4 could have just come and testified, well, they still would have had
5 to review the documents and come to the conclusions. The difference
6 here is they were written, and the government's not contending for
7 the court's consideration, although the defense is saying this, but
8 the court -- the government with the burden isn't saying because it
9 was 2 pages, 15, or a 117-page motion it must take 15 months. No.
10 It took the period of time it took to get it finished. The document
11 was produced. It was turned over. We had them all. Once we had
12 them all and everything else was completed, we moved forward with the
13 32.

14 So, again, going back to the witness testimony, the
15 government doesn't see how what the inner workings of the CENTCOM,
16 GTMO, Department of State, the OCA for Specs 3 and 15 would have to
17 do with that, Your Honor; and the reason I separated those is because
18 ODNI, DISA, and CYBERCOM weren't part of any of the delays; that was
19 our classification reviews done for evidence that was not the charged
20 documents. It was simply for closing the hearing or handling the
21 information.

22 MJ: So assume -- is the government proffering, then, for
23 purposes of this motion that if the CENTCOM, GTMO, Department of

1 State, and OGA classification reviews were done in August or
2 September and the other ones weren't, the closure justification
3 reviews, would the government have gone to an Article 32?

4 TC[MAJ FEIN]: No, Your Honor, and that's outlined -- that's
5 outlined in the monthly, every 30-day updates and requests by the
6 government to the convening authority. I highlight, Your Honor,
7 Enclosure -- again, Enclosure 11 to the response to speedy trial
8 motion. I think it starts at page 10 and starts the actual
9 memorandum from the trial counsel. Your Honor, if you go to ----

10 MJ: Let's go through these memoranda. I'd like to go through
11 ----

12 TC[MAJ FEIN]: Yes, Your Honor.

13 MJ: ---- them one by one and, again, I'm looking at the
14 relevance of these witnesses now on ----

15 TC[MAJ FEIN]: Yes, ma'am.

16 MJ: ---- whether I'm going to produce them. Let's look at
17 the 22 May 2011.

18 TC[MAJ FEIN]: Ma'am, the first one's actually 25 April, but it
19 doesn't -- it's the very first one.

20 MJ: And what page is that one on?

21 TC[MAJ FEIN]: Ma'am, I think you might be looking at the
22 accounting memorandums and not the actual ----

23 MJ: Oh, I am.

1 TC[MAJ FEIN]: ---- delay requests.

2 MJ: Where -- so what enclosure are they?

3 TC[MAJ FEIN]: Enclosure 11, Your Honor.

4 MJ: That's what I'm looking at.

5 TC[MAJ FEIN]: That might be 28.

6 MJ: I'm looking at 11. It says, "Prosecution Response to
7 Defense Motion to Dismiss, Enclosure 11."

8 Bailiff, if you would, please hand over this to -- let
9 both sides see it and maybe I'm confused.

10 **[The bailiff did as directed and counsel reviewed the exhibit.]**

11 TC[MAJ FEIN]: This is correct, Your Honor.

12 MJ: I didn't -- if there's an April one in there and I --
13 just maybe I just haven't found it.

14 TC[MAJ FEIN]: I think, Your Honor, because this was printed
15 front and back and we didn't put page numbers on it, Your Honor, so
16 -- so, Your Honor, the first one dated 25 April 2011, a memorandum
17 for the Commander, Joint Base Myer-Henderson Hall, signed by myself,
18 the very first paragraph, the purpose, "The prosecution in the above
19 referenced case requests you delay restarting the 32 until the United
20 States receives consent from all OCAs to release discoverable
21 classified evidence and information to the defense."

22 MJ: Okay.

1 TC[MAJ FEIN]: This memo continues just giving the background
2 for the different -- the general background ----

3 MJ: So what's the difference between -- what -- and I'll be
4 educated. Again, I'm looking at this for purposes of this witness
5 motion. Is there a different procedure that you have to go through
6 to get permission to release from the defense than for a
7 classification review? They're two different things; is that right?

8 TC[MAJ FEIN]: It is, Your Honor, but it's ultimately both are
9 decided by original classification authorities but maybe not the same
10 ones, but it is essentially the same procedure. They must know what
11 the information is that's being -- that's classified that's being
12 disclosed. They have to approve it going to the defense.

13 MJ: Well when you say that it's classified, does that mean
14 before or after the classification review?

15 TC[MAJ FEIN]: The classification -- well, Your Honor, I
16 apologize. I started this off by saying there's -- the term
17 "classification review" is used in three different contexts. The
18 third I didn't actually get to is it's used as a simple almost layman
19 term, not a term of art, of just reviewing something to just figure
20 out what it's initially classified as, almost a preliminary review;
21 hand it off to a court security officer, say, "Is this classified; is
22 this not"; that person with competent background reviews it, says, "I
23 think it is classified."

1 MJ: Well if it was classified at the time of disclosure,
2 wouldn't it be marked or no?

3 TC[MAJ FEIN]: It would be marked, Your Honor, but the
4 difference here is that for the charged documents to prove beyond a
5 reasonable doubt and prefer criminal charges against an accused and
6 ultimately go to a 32 at trial, we have to prove by the ultimate
7 competent authority and original classification authority that it
8 was, in fact, classified at the time. So although it's marked, we
9 could -- granted, Your Honor, we could go to a 32. Even taking the
10 defense's argument today, it was found on SIPRNet we could turn it
11 over, but in the same court-martial and same litigation the defense
12 also is taking the position previously that there might be
13 over-classification in the government. There's a check there, Your
14 Honor, and the check is, is having the component authority either
15 attest to or testify to, which would be attesting, that it was, in
16 fact, classified.

17 MJ: Okay, I understand that. These arguments will be made at
18 the speedy trial, ----

19 TC[MAJ FEIN]: Yes, ma'am.

20 MJ: ---- you know, whether the reasonableness of the
21 government's posture in going forward, do that -- and whether Colonel
22 Coffman abused his discretion in granting the delays. I'm still
23 focused on the question of -- well two things. I want to go through

1 these documents here to see what else -- what other pieces of the pie
2 were causing the delay; ----

3 TC[MAJ FEIN]: Yes, ma'am.

4 MJ: ---- and -- or at least that the government is proffering
5 were causing the delay; and the second thing that I'm still concerned
6 about is at the end of all of this if I don't call these -- I'll have
7 these witnesses come in, what is going to -- is there going to be
8 evidence before the court where I'm going to have any idea of whether
9 there was inordinate delay or not?

10 TC[MAJ FEIN]: [Pause] Well ----

11 MJ: Again, is it something that takes a week and you put it
12 in your inbox for 10 months or is this something that takes 10
13 months?

14 TC[MAJ FEIN]: Yes, ma'am, and I think it goes back to the
15 testimony of Mr. Haggett explaining the process in general and,
16 again, the pie analogy that even -- the government offered, even if
17 true there was -- that was not the only reason of delay, which I know
18 you want to go through these memos right now. There were a lot --
19 there's multiple reasons of delay that squarely fit within
20 707(charlie) in the discussion in 707 ----

21 MJ: Okay, well let's go through ----

22 TC[MAJ FEIN]: ---- and I think ----

23 MJ: ---- let's go through them.

1 TC[MAJ FEIN]: Yes, Your Honor.

2 So this very first one does talk in general about getting
3 the approvals and it gives the background in paragraph 2 about the
4 special circumstances of classified digital media and what the
5 prosecution has been working on with the different OCAs.

6 **[Pause]**

7 MJ: So the OCA disclosure requests, are they in your exhibit
8 package somewhere?

9 TC[MAJ FEIN]: They are, Your Honor.

10 **[The trial counsel and assistant trial counsel conferred.]**

11 TC[MAJ FEIN]: One moment, Your Honor; sorry. **[Pause]** Yes, Your
12 Honor, Enclosure 23 and 24, example of the approvals. And as the
13 court will see from these documents, this also is a rolling process,
14 but, again, it's all documented. The documentary evidence has been
15 provided.

16 So, Your Honor, if we go to ----

17 MJ: Okay.

18 TC[MAJ FEIN]: ---- the next month ----

19 MJ: So right here where these are the two bases for delay at
20 this point, the approvals and the classification reviews in April.

21 TC[MAJ FEIN]: Yes, Your Honor.

22 MJ: Okay.

23 Let's go to May.

1 TC[MAJ FEIN]: And, Your Honor, just for purposes that this
2 isn't for -- again it's for speedy trial litigation going forward but
3 -- so these were filed, but as the defense has pointed out and the
4 court knows, there were also accounting memos done afterwards, so
5 ----

6 MJ: And where are those?

7 TC[MAJ FEIN]: That is Enclosure 28, Your Honor.

8 MJ: Okay.

9 TC[MAJ FEIN]: So those were not approvals of -- necessarily
10 approvals of future delay; that was an accounting of all the delay
11 that has occurred previously and different reasons for those delays.
12 So essentially about every 15 days the convening authority was taking
13 an action dealing with getting updates and delays.

14 MJ: All right.

15 TC[MAJ FEIN]: So, Your Honor, the next, 22 May. The purpose is
16 essentially the same as the previous, to release discoverable
17 unclassified and classified evidence information. However, different
18 than the previous, the update lists five different reasons of what is
19 going on in order to accomplish the purpose.

20 First, obtain consent to disclose classified evidence.

21 2. Receive completed classification reviews.

22 3. CID began making copies of classified digital media
23 and evidence for disclosure to the defense.

1 MJ: And that's in antici -- okay, got it.

2 TC[MAJ FEIN]: 4. The prosecution then learned between the
3 previous one and this one that several exhibits and document in the
4 unclassified CID case file required authorization to disclose apart
5 from any classified information.

6 MJ: Why?

7 TC[MAJ FEIN]: Well, Your Honor, actually the next -- the next
8 one is the exact reason, because they dealt with grand jury
9 information or results -- information that -- where the results of
10 sealed search warrants or subpoenas in federal court. And just for
11 clarity purposes, this is the federal court, not a military court at
12 this time.

13 MJ: Okay.

14 TC[MAJ FEIN]: Your Honor, the next, 27 June, the stated purpose
15 is essentially the same, discoverable -- just release discoverable
16 unclassified and classified evidence and information to the defense.
17 So actually it's added unclassified because that was what was
18 happening at the time. The update starts with:

19 1. Obtain consent to disclose classified evidence.

20 The second, complete classification reviews.

21 The third, on 23 June 2011, after forensic examiners
22 discovered another document of digital evidence requiring OCA consent
23 to disclose.

1 Again, this is an ongoing law enforcement investigation
2 and once they found more classified information had to continue doing
3 -- had to continue getting the approvals as outlined right here.

4 MJ: When was the investigation complete?

5 TC[MAJ FEIN]: Your Honor, frankly the investigation's not
6 necessarily complete at all today. It's still an ongoing
7 investigation with all the law enforcement organizations, but the
8 government had to go -- had to prefer charges and had to move
9 forward.

10 MJ: Okay.

11 TC[MAJ FEIN]: So it was the best evidence at the time.

12 Your Honor, the fourth reason in bravo was submitted an
13 unclassified CID case file to different members of the intelligence
14 community for them to review for classified equities, so that's the
15 unclass CID -- so even at this point, Your Honor, the unclassified
16 information is being reviewed because it had information as you'll
17 see in the subsequent filings -- or, excuse me, the subsequent
18 request, it had classified information in it, and that's actually
19 what Mr. Haggett will testify about he specifically did. He reviewed
20 997 documents of the unclass file, and he looked for those equities
21 and then he -- we sent it out from his review.

1 Your Honor, the fifth reason, the fifth update, U.S.
2 Attorney's Office has continued to work to obtain authorizations from
3 district court judges.

4 Number 6, an update that the prosecution received
5 approval to produce the entire Secretary of the Army 15-6 and its
6 related documents, and there was a protective order that was issued,
7 that's part of the record as well as acknowledged here, and once the
8 defense acknowledge it, it will be starting to be produced. So all
9 this was happening, Your Honor, and it needed to happen before the
10 32.

11 Your Honor, moving to the next, 25 July. Again, the same
12 stated purpose, receives proper authority for un -- to disclose
13 unclassified and classified evidence and information to the defense.
14 The unclassified, Your Honor, at that point and the previous was a
15 SECARMY 15-6 that was done under a separate protective order.

16 Your Honor, for the update, the first, obtain consent to
17 disclose evidence.

18 2. Also complete the classification reviews.

19 The third stated reason in paragraph 2(a) is that the
20 classified CID forensic report is different than the actual case file
21 are prepared for disclosure pending final approval of the different
22 OCAs of their information in the report.

1 Your Honor, the fourth stated reason similar from before
2 is that members of the intelligence community have identified certain
3 sensitive documents; are doing further review.

4 MJ: Now where are we? We're in July now? Where are you
5 looking?

6 TC[MAJ FEIN]: 25 July 2011, Your Honor, under paragraph
7 2(bravo).

8 MJ: Okay.

9 TC[MAJ FEIN]: The fifth stated reason on this document, again,
10 is the U.S. ----

11 MJ: So that's the same reason as the last delay.

12 TC[MAJ FEIN]: It is, Your Honor, although there's an update
13 there with specifics that they've identified certain documents before
14 it was sent and here's an update that says documents have been
15 identified.

16 MJ: They identified it before, too, in June, right?

17 TC[MAJ FEIN]: Well, Your Honor, in June it was only one of them
18 had identified documents ----

19 MJ: Oh, okay.

20 TC[MAJ FEIN]: ---- not the other. In this one, they both had
21 identified separately.

22 MJ: Okay.

1 TC[MAJ FEIN]: Your Honor, the fifth reason, U.S. Attorney's
2 Office again, mostly here -- at the very end sentence, "Most of the
3 relevant disclosure orders have been signed but a few remain
4 outstanding. That is the same reason as before, so U.S. -- we're
5 relying on U.S. Attorneys to keep moving in district court and that's
6 multiple district courts.

7 Your Honor, the seventh -- the sixth reason since the
8 previous request the prosecution did produce the SECARMY 15-6 as well
9 as a completed record of one individual's reduction board, which
10 totaled approximately 10,000 pages and that was in response to a
11 defense request for discovery.

12 The -- Number 7, the seventh reason, the prosecution
13 intends to produce portions of the unclassified CID case file has
14 been approved by the stakeholders. So, again, it's CID now, their
15 unclass -- the portion that wasn't being reviewed above is now going
16 to be produced.

17 Your Honor, 25 August 2011, same stated purpose, receive
18 proper authority to release discoverable unclassified and classified
19 information to the defense in evidence.

20 The first reason, obtain consent to disclose classified
21 evidence.

22 Second, receive completed classification reviews.

1 The third stated reason, Your Honor, is that CID is
2 conducting a secondary review of the derivative classification of the
3 forensic reports. As previously stated, it was 22 separate forensic
4 reports containing classified -- excuse me, 19 of the 22 that
5 contained classified information. Those have been provided to the
6 court as an enclosure to this motion. As it explains, the government
7 security expert reviewed them and realized that certain portions of
8 them weren't properly marked so couldn't disclose them to the
9 defense; needed to be fixed. That's outlined here for the convening
10 authority.

11 The fourth update, three of the reports are unclassified
12 and were given to the defense in discovery on 25 July.

13 The fifth reason, Your Honor, again, members of the
14 intelligence community are still reviewing those documents that were
15 previously segregated and one of them completed its additional review
16 but another one is still ongoing.

17 MJ: When the prosecution is talking about, on 2(a) there,
18 continuing to work with original classification authorities along
19 with receiving completed classification reviews, other than the
20 letters that I have here that went out every couple of months saying
21 please finish them, what other evidence is presented on what the
22 government did with these agencies?

1 TC[MAJ FEIN]: Yes, Your Honor. First and foremost, some of the
2 e-mails that we had approval to use for the speedy trial motion up to
3 this point were disclosed to the defense and to the government, both
4 unclass and classified, in Enclosure 1 and 2 that shows us pinging
5 and us receiving responses.

6 MJ: And those are the ones you're going to break up for me
7 agency by agency for these?

8 TC[MAJ FEIN]: Yes, Your Honor.

9 MJ: Okay.

10 TC[MAJ FEIN]: Yes, Your Honor. So, again, not all; the
11 government acknowledges -- understand the burden that we did not
12 provide all the e-mails but we did provide a sampling of the e-mails
13 for some of the agencies of that back and forth.

14 The other we have on the chronology. Again, not
15 necessary it's just a proffer; it's not documentary evidence of the
16 multiple phone calls we have. And again that can be also
17 accomplished by affidavit or ultimate, I guess, testimony by members
18 of the prosecution on what we did or did not do.

19 MJ: All right.

20 TC[MAJ FEIN]: Your Honor, so continuing here on 25 August 2011,
21 the sixth stated reason in paragraph 2(delta), the U.S. Attorney's
22 Office has obtained all authorizations from the relevant district

1 court judges and we're currently obtaining the signed protective
2 orders from the defense and will disclose.

3 And then on page 2, Your Honor -- and, Your Honor, again,
4 these go to the defense. This wasn't done *ex parte* with the
5 convening authority. This one, Number 7, says, "We're continuing to
6 work with the FBI and DSS to receive authorization to disclose the
7 relevant portions of any other case files," and then there's another
8 update of something that's going on to give that evidence, if we can,
9 get it to the defense -- to the defense.

10 MJ: Now you say these requests went back and forth to the
11 defense; is there a defense objection to any of these delays?

12 TC[MAJ FEIN]: Yes, Your Honor. The defense did object each
13 time to the delays.

14 MJ: And where are those?

15 TC[MAJ FEIN]: Your Honor, the government has provided those in
16 the e-mail enclosures as well and with specific -- and those will be
17 broken out as well, Your Honor.

18 MJ: Okay.

19 TC[MAJ FEIN]: And, Your Honor, the eighth update of something
20 else that was going on and it just shows again activity, the
21 evidence: Since the previous report, prosecution produced 21,000
22 pages of documents, again, based off defense's request, and as we
23 receive other approvals it will be disclosed.

1 Your Honor, the next, 26 September 2011, same stated
2 overall purpose. We received proper authority to release
3 discoverable unclassified and classified evidence and information to
4 the defense. The first two updates are the same: approvals for
5 classified evidence and (2) receive completed classification review.
6 However, in this one, it is stated that since the last request the
7 prosecution received classification reviews from U.S. Cyber Command.
8 Additionally, working with Department of State and U.S. Southern
9 Command, who expects to receive them, to review more than 80 days in
10 the next two weeks, so right there shows, as of 26 September, we
11 expected to get it in 20 -- in 2 weeks, a very specific update.

12 Your Honor, the fourth item given to the convening
13 authority, CID started the necessary secondary review of those -- of
14 the derivative classifications. After it completes its review, then
15 it will be given to the Army G2 for approval to disclose it to the
16 defense.

17 Your Honor, the fifth update, again talks about the
18 members in the intelligence community reviewing what was previously
19 thought to be unclassified material that was classified and
20 specifically says it was complete but we were working with one of the
21 entities to provide a portion-marked version of them. So once we
22 give it to the defense, they know exactly what's classified or not
23 and that's also provided, there's e-mails, classified e-mails that

1 were downgraded from JWICS that have been provided to the court and
2 the defense that show that process in Enclosure 2.

3 Your Honor, the sixth reason, the U.S. Attorney's Office
4 has obtained all of the authorizations and once we receive all of the
5 signed protective orders we'll release the information to the
6 defense.

7 The seventh stated reason: Continue to work with the FBI
8 and DSS in order to obtain their files and just -- through them.

9 The eighth stated reason, again more information was
10 disclosed in discovery.

11 And on page 2, the ninth stated reason: The prosecution
12 continues to work with the defense to frontload any administrative
13 requirements for the defense members and their forensic computer
14 experts to review classified information evidence. Since the last
15 request, the prosecution provided the defense with specialized
16 hardware and software so they'll be able to review all of the
17 classified discovery and their experts may use their own personal
18 equipment to analyze and review forensic duplicates of the evidence.

19 And, of course, what's also been provided to the court as
20 part of Enclosure 1, the e-mails, which we will segregate, are all
21 the different e-mails between the defense and the prosecution at this
22 time talking about what equipment they need and how the government
23 was purchasing it for the defense so they could start processing this

1 classified information and whether they would need more experts, all
2 of that was occurring at the same time. Again, it's provided, the
3 evidence, the e-mails to the court.

4 Your Honor, on 25 October 2011 -- so just to highlight,
5 Your Honor, so even with approvals once the defense has the proper
6 equipment, they wouldn't even be able to process what we give them,
7 we're working concurrently for that, as outlined in the memo. And
8 this is what the convening authority had presented to him.

9 25 October 2011, United States receives the proper -- the
10 purpose, overall purpose: To release discoverable classified
11 evidence and information to the defense, so this did change from
12 unclass and class to just classified.

13 As an update, Your Honor, the first and second are again
14 the same: Consent to disclose classified evidence and complete
15 classification reviews; and then there's a specific update that
16 classification reviews were completed and it lists the different ones
17 that were completed since the last.

18 The fourth reason: CID completed the necessary secondary
19 review and the information was delivered to the Army G2 or will be
20 delivered no later than 27 October to get approval to disclose the
21 information.

22 The fifth request ----

23 MJ: Is this information required for trial?

1 TC[MAJ FEIN]: Absolutely, Your Honor. This is the most -- if
2 there's anything more critical, the two -- excuse me. The two key
3 pieces of critical information before you go to Article 32 would be
4 the computer forensic reports that explain exactly how Private First
5 Class Manning committed the crimes that he's been charged with;
6 otherwise, the defense would be walking in completely blind to an
7 Article 32 and we'd be first litigating an ineffective Article 32.
8 And the second, and what I've already talked about, equally important
9 is the proof that the information was, in fact, classified at the
10 time. We've already discussed that, but the forensic reports are the
11 mainstay. The CID investigative file was already disclosed to the
12 defense. Those are all the different AIRs, witness interviews, the
13 different just investigative tasks of agents, but the forensic
14 reports show exactly how the classified information was compromised
15 and all the different intricacies that would allow the defense to
16 adequately cross-examine or explore for discovery purposes as the
17 defense has said was their purpose for the Article 32 in their filing
18 for speedy trial in this courtroom during the 32.

19 Your Honor, the fifth stated reason, again going to the
20 members in the intelligence community, that we did absent an
21 unforeseen administrative issue, the prosecution will produce the
22 portion-marked versions of the few documents remaining from the CID
23 case file.

1 Also, Your Honor, the sixth reason, talking about an
2 evidence classification guide, although this did occur or was working
3 to occur, it actually never came to fruition, but this was started.

4 Seventh is the same as previous -- as before, the seventh
5 reason, paragraph (e).

6 The eighth reason, paragraph (f), again, an update on
7 discovery of what's occurred.

8 Paragraph 9. Paragraph 9, Your Honor, -- or not --
9 excuse me, paragraph (g), reason 9, again, reason for delay on
10 25 October for the next 30 days, the prosecution scheduled a meeting
11 with the defense for 8 to 9 November. The purpose of the meeting is
12 for the prosecution to present its case, including a discussion of
13 the evidence supporting the charges against the accused. The goal of
14 the meeting is to help the defense focus their review of the
15 voluminous forensic evidence and potentially minimize future delays.

16 And what wasn't said on here, Your Honor, and already is
17 part of the filing is there was a second briefing then as well. That
18 wasn't what the convening authority had in front of him at the time.

19 Your Honor, Number 10, again talking about administrative
20 requirements the defense requests and then getting the defense
21 prepared to receive all the classified information.

22 Your Honor, the very last of these, 16 November 2011.
23 Now, Your Honor, the purpose, the general purpose has changed in this

1 motion -- or in this memorandum. It states that the prosecution
2 requests you to direct the investigating officer restart the Article
3 32 investigation, so this is a restart and a delay request. The
4 prosecution is prepared to proceed and by 1 December 2011 should
5 receive all approvals and classification reviews necessary to
6 proceed.

7 Second ----

8 MJ: What do you mean "proceed" and what do you mean by
9 "restart"?

10 TC[MAJ FEIN]: Well, Your Honor, because the -- might be a poor
11 choice of words but the Article 32 investigation had been delayed up
12 to this point for multiple reasons and it's to restart it; to order
13 the investigating officer to complete the investigation.

14 MJ: Okay, okay.

15 TC[MAJ FEIN]: Second, the prosecution requests the period of
16 delay and this is the actual specific part about it being excludable
17 delay.

18 The first reason, Your Honor: Original classification
19 reviews of classified information; this is paragraph 2(a). The
20 government gives the update to the convening authority that we
21 received all of the classification reviews for all charged documents
22 except one, and we have been told by that OCA delegate that we should
23 receive it no later than 1 December. And based upon that commitment,

1 the prosecution request the 32 investigation start -- restart at this
2 time to avoid further delay. So although we didn't receive it at the
3 time, as annotated here, from this one OCA, this one organization, we
4 can still restart it.

5 Your Honor, the second reason: OCA consent to disclose
6 classified information. I'll direct the court's attention to the
7 very end of that paragraph; this is paragraph 2(b). The second
8 reason is, is that the prosecution recently produced 380,000 pages of
9 discovery, including all charged documents; forensic reports, the
10 final versions; the complete CID unclassified case file;
11 classification reviews; two classified military intelligence case
12 files. Again, this is what would be needed before restarting the 32.

13 The third reason: Defense request for appropriate
14 security clearances for defense team and access. On 4 November the
15 prosecution received the final approval necessary for the defense
16 team and accused to access information.

17 And, Your Honor, the fourth reason, as completely
18 separate from what the defense has for the purposes of today's
19 litigation, on page 2, under 3(bravo), was the OPLAN Bravo plan,
20 which will be litigated, I assume, next week.

21 So, Your Honor, before we started this, the government's
22 position again, this is a very large pie for many reasons. One of
23 the slices is evidence in discovery and then a smaller slice, or

1 classification reviews, to prove information was classified; and
2 another one is authority to disclose the evidence to the defense.
3 Even if the classification reviews were done within 2 days of the
4 18 March request, until all those other steps were completed the
5 government could not move forward, which is why the government's
6 position is, absent other case law, what the individual agencies did
7 or didn't do and how they did it is not relevant to speedy trial in
8 this case with these facts.

9 [Pause] Your Honor, we left off on original
10 classification authorities, the list of the different ones, going
11 down the list of the defense's motion to compel.

12 MJ: What do you mean you left off the ----

13 TC[MAJ FEIN]: I'm sorry. We've gone on some tangents based off
14 your questions. We were going down the list each individual
15 witnesses ----

16 MJ: Uh-huh [affirmative response].

17 TC[MAJ FEIN]: ---- for each witness. We finished Dr. Sweda and
18 then we started -- we left off with original classification
19 authorities.

20 MJ: Uh-huh [affirmative response].

21 TC[MAJ FEIN]: So if you want to keep going down the list, Your
22 Honor, the rest would be the post-referral ----

1 MJ: So it's the government's position, then, that regardless
2 of when these classification author -- if the classification
3 authorities came in, in October of 2011, the government still
4 wouldn't have gone to trial until December of 2011 based on these
5 other reasons.

6 TC[MAJ FEIN]: Yes, Your Honor, because frankly the defense
7 wouldn't have the evidence to defend at the Article 32 nor would we
8 have the approval to use the evidence at the Article 32. It goes to
9 the weight -- the evidence in this trial, Your Honor. The
10 classification review is just one type of evidence.

11 **[Pause]**

12 MJ: All right.

13 TC[MAJ FEIN]: Your Honor, the next one on the list is
14 Headquarters, Department of the Army -- a witness from the
15 Headquarters, Department of the Army. Your Honor, first, just to
16 clarify for the -- well, for the record, Headquarters, DA -- OTJAG is
17 Headquarters, DA; that is the technical chain we go through for all
18 matters Headquarters, DA.

19 The prosecution has provided all the information in its
20 response that the government -- or the defense is asking for,
21 e-mails. All those e-mails are listed and they're explained. We
22 will have them segregated for the court, but they're -- it's
23 explained in detail, page 23, 24, and 40 of the defense -- or the

1 government's reply -- excuse me, response to the defense's speedy
2 trial motion.

3 MJ: 23, 24, and 40?

4 TC[MAJ FEIN]: 23, 24, and 40, Your Honor, and these do have the
5 Pinpoint sites for e-mails. It lays out the exact days we provided
6 the e-mails. The government isn't contesting the facts here, and I
7 only say that because the defense seems to make -- wanted to make
8 argument but those arguments aren't facts.

9 MJ: But those e-mails have been already provided to me in
10 this **[holding up an enclosure of AE 339]** ----

11 TC[MAJ FEIN]: Yes, Your Honor.

12 MJ: ---- when I ask you to not have me go through ----

13 TC[MAJ FEIN]: Yes, Your Honor.

14 MJ: ---- two volumes and find e-mails that I've got, okay.

15 TC[MAJ FEIN]: Yes, Your Honor.

16 So these e-mails have been provided. Yes, the name of
17 the individual at OTJAG is redacted, but it says OTJAG on it and Crim
18 Law Division and it says exactly what occurred, including the
19 prosecution reaching out multiple times; that not working; not
20 receiving the results that the prosecution needed; the Deputy Staff
21 Judge Advocate for this command started reaching out; and then
22 finally the updates started rolling in, but we know already on the
23 record when we received the information. All that, again, is

1 recounted here; it's also in the due diligence filing, so it's done
2 two times for the defense and for the court to see with the evidence
3 provided.

4 **[Pause]** So, Your Honor, overall for Headquarters, DA,
5 similar to the previous argument, the government would argue it's not
6 relevant or necessary for a witness to show up to say what the
7 prosecution did or didn't do to show diligence for this information.
8 The requests are in the -- are in the record of when we asked
9 Department of Defense which covers the entire Department of Defense,
10 including the Department of the Army, and the different follow-up
11 that occurred. And the same thing with the e-mails that were used
12 are there to see it.

13 MJ: Okay.

14 TC[MAJ FEIN]: Your Honor, the next, Department of State and
15 Diplomatic Security Services. Just as a point of clarification, the
16 government produced the entire Department -- or Diplomatic Security
17 Services file to the defense on 23 November 2011. This is actually a
18 two-prong request, beginning with someone from Department of State,
19 the very last sentence or very last part says, "Oh, and someone from
20 the Department of Security Services." That entire file was disclosed
21 and has already been put on the record multiple times of its full
22 disclosure.

23 MJ: Okay.

1 TC[MAJ FEIN]: Your Honor, similar to the Department of State,
2 again this is a similar argument to what we just talked about for 707
3 but we mix ----

4 MJ: So the DSS file was disclosed when?

5 TC[MAJ FEIN]: Your Honor, it was disclosed on 23 November 2011.

6 MJ: Okay. Was that part of the -- what you had in the delay
7 request under -- is that pieces of the forensic CID or is that
8 something separate?

9 TC[MAJ FEIN]: Your Honor, when I was reading through Enclosure
10 11 to the government's response, one of the reasons in late August
11 was to coordinate turning over the FBI file or the -- and the State
12 Department file; that coordination was completed and we disclosed on
13 23 November.

14 MJ: Okay.

15 TC[MAJ FEIN]: And that's reflected, Your Honor, in Enclosure
16 18, which is our discovery production log that we provided the court
17 and defense of all the dates and the general subjects of the many
18 thousands of pages that were produced.

19 MJ: Okay.

20 TC[MAJ FEIN]: So, Your Honor, for Department of State, the
21 defense is outlining facts that we have provided to the defense. It
22 seems that -- it appears that the defense is trying to -- they've
23 provided no facts to support this argument for relevance and

1 necessity for a witness to come for speedy trial. The facts we are
2 not contesting. We could even work on a stipulation of the facts for
3 Department of State. Well we even said it on the record we did not
4 start reviewing the documents until post-arraignment, more towards
5 the end of the -- the beginning of the summer. That's already in our
6 filing. It's in our due diligence filing. We're not -- those aren't
7 facts that are being contested, so it really doesn't make sense why a
8 witness needs to come to explain that process since these people --
9 these individuals are being offered post-referral discovery centric
10 reasons.

11 MJ: Defense, you have any objection to talk to the government
12 about a stipulation of fact on the Department of State?

13 CDC[MR. COOMBS]: No. I'd be happy to draft a stipulation, and
14 then if the government agrees with it, then I think that would be
15 fine.

16 MJ: All right, let's start there for the Department of State.

17 TC[MAJ FEIN]: And, Your Honor, in that vein I would actually
18 say for almost all of these, if -- the facts, again, the defense is
19 -- some -- is trying -- or is contesting whether something did or
20 didn't occur by the prosecution, the prosecution has in the due
21 diligence filing and in this response has stated exactly what the
22 prosecution has by a certain date, so if the issue is a legal issue
23 for the court to make determinations on what's reasonable and not,

1 again, it goes back to the government doesn't see what authority --
2 what authority exists for the defense to use the inner workings of
3 these agencies for speedy trial for Article 10 or the 707. If the
4 simple issue is when did we do something, "we," the prosecution,
5 we've laid it out there. It doesn't mean the defense isn't --
6 couldn't argue that it wasn't diligent.

7 MJ: And that's true for the FBI, DHS, ONCIX, DII. I mean,
8 are you talking to all of these that ----

9 TC[MAJ FEIN]: Yes, Your Honor. As far as when it comes to the
10 dates of when the prosecution did it. I mean that, of course, was
11 the purpose, our thought of the purpose of the chronology. Our
12 original chronology had all that. Granted, our original chronology
13 had everything the government was doing as ----

14 MJ: See, that's what -- I mean I understand that the
15 government's trying to provide it all and you've kept it all going
16 along the way, but just understand for the recipient, it's very
17 difficult to say, ----

18 TC[MAJ FEIN]: Yes, Your Honor.

19 MJ: ---- "Oh, let me find on page 175 on line 3 that you
20 called the State Department."

21 TC[MAJ FEIN]: Yes, Your Honor, but and that's so we -- I mean I
22 know this is still -- this is still being worked out between the
23 parties for the joint chronology, but even in the most recent

1 chronology, the prosecution has said these are the dates that we
2 believe the defense wouldn't necessarily object to, right, because
3 it's only those major events for which the defense says actual
4 knowledge existed to facilitate a stip. Now, granted, what I'm
5 talking about right now, the government could offer up a stip or
6 where the parties agree is the actions of the government. For the --
7 whether they were diligent or not is the issue, and that's why the
8 government's starting point for this litigation are these witnesses
9 aren't going to lend -- isn't going to aid the court in making a
10 determination whether the prosecution was diligent or not is our
11 contention; don't think that case law supports that proposition;
12 think it actually supports the opposite. The focus is on the
13 prosecution.

14 MJ: Is the government willing to work with the defense to
15 enter a stipulation of what dates the government did what with
16 respect to each of these entities?

17 TC[MAJ FEIN]: Absolutely, Your Honor.

18 MJ: Is the defense willing to work with the government to do
19 that?

20 CDC[MR. COOMBS]: Yes, Your Honor. So I could -- I would list
21 the questions that I would want and the government would answer the
22 question and provide the documentation for it to at least be able to
23 put in the stip.

1 MJ: Is that acceptable?

2 TC[MAJ FEIN]: Well, Your Honor, so ----

3 MJ: Well ----

4 TC[MAJ FEIN]: ---- that was an added caveat to this, the
5 documentation. So, yes, that would be more efficient for the Court
6 and for the parties probably, so, yes, we'd even be willing to do
7 that, but that actually doesn't alleviate the problem. The issue is,
8 is when did the prosecution do that? Some actions don't have --
9 don't have documentation. We have listed in our due diligence filing
10 with the court that the defense has and in our motion of what certain
11 dates certain activities happened.

12 MJ: Is the government willing to put somebody from the
13 prosecution team on the stand that could answer these questions?

14 TC[MAJ FEIN]: Your Honor, we would offer that an affidavit from
15 the prosecution would be sufficient for the same purpose. I mean
16 essentially it's interrogatories for the prosecution to answer.

17 CDC[MR. COOMBS]: Because part of the problem with the
18 chronology that the government says answers these questions is
19 they'll say on X date called Department of State or X date called
20 ONCIX, but it doesn't give any detail. I mean, is it a call just to
21 say hello and how are things going or is it actually probing like,
22 for example, the OCAs, probing what is taking so long? Where are you
23 at? How much longer? You know, the types of questions that a

1 diligent prosecutor would ask, so that would be an example that the
2 chronology does not answer; instead, all it just simply does is list
3 a day and who they contacted.

4 MJ: Because I'm thinking in lieu of all these witnesses, I
5 mean, what are the chances that somebody at Department of Homeland
6 Security says, "Oh, the Department of the Army called me today. Let
7 me log that in my computer." I would think the prosecution would
8 probably be keeping more diligent records than these particular
9 agencies would when have when they called.

10 TC[MAJ FEIN]: And ----

11 CDC[MR. COOMBS]: Yeah, correct, Your Honor, on at least when
12 they reached out to them and contacted them and some of the -- I mean
13 not to go back -- well I'll have a rebuttal to some of the things
14 that Major Fein has stated, but to go just simply with a particular
15 agency, like ONCIX, there have been -- that in and of itself, there
16 have been different representations of when they knew what and how
17 and so that's where ONCIX would be the agency that could say, "Here's
18 the date that we told the trial counsel what we had, how we had it,
19 and what the trial counsel knew." Only with the response did we get
20 the rest of that little verbiage that we talked about earlier. That
21 adds a lot more context to what happened before that, though the
22 chronology would just simply say contacted ONCIX. So that's where,
23 you know, if we lay out our questions and the government responds to

1 them and there's some proof to that then or we can -- they can say,
2 "Here's a person from ONCIX that you will call and they'll verify
3 this information," then that would alleviate the need for a witness
4 and we could enter a stip and then we could just argue from that.

5 TC[MAJ FEIN]: And, Your Honor, the closing point the government
6 was going to have is actually what you just said right before this,
7 which is practically speaking, the prosecution with a Soldier in
8 pretrial confinement, the accused, is the only one in the entire
9 United States Government who's keeping a log of the activity they are
10 creating. No one bills at 6 minute increments in the government, and
11 so -- well, that might not be true. There might be some that do, but
12 we are the ones who are keeping the log. We are the ones who are
13 responsible under the law to keep the logs; that's why diligence is
14 viewed prosecution's diligence, not others, so practically speaking,
15 yes, an individual here might be able to talk about the general
16 process and they're going to have specific memories over this period
17 of time of what might have occurred or not, but as far as dates and
18 times, I think it's completely unreasonable for anyone considering
19 that it's not part of their normal course of business to keep that
20 information. It's part of our business because we have the burden of
21 proof and that's what you're taught at the JAG School all the way up
22 through practice; you keep your time sheets and that's what the

1 prosecution did. Actually, what the prosecution did over e-mail, not
2 all our time was accounted for.

3 So what the government would propose, Your Honor, is that
4 the defense could submit the questions to the government and the
5 government will -- could answer them under an affidavit, so it's
6 essentially an interrogatory to the government, to the prosecution,
7 answer the questions, sign it under oath, and then that -- the
8 defense has their answers; and if there's any gaps that the
9 government is needing to fill that we don't have e-mails for or we
10 don't have memorandums or requests for, then we are filling it with
11 either our own affidavit or it's our burden; we produce the witness.

12 MJ: Defense?

13 CDC[MR. COOMBS]: I think that could work, Your Honor, if they
14 provide the answer and, yes, sign it in affidavit form, because the
15 actual fact -- the facts of when things occurred is what the defense
16 is going to use to show that there wasn't diligence on the part of
17 the government, especially in light of misunderstandings that they
18 had post-referral that affected their pre-referral conduct.

19 MJ: Well that's what I understand. I understand what the
20 arguments are going to be. I guess ----

21 CDC[MR. COOMBS]: Right.

1 MJ: ---- you know right now I'm trying to decide, you know,
2 am I going to be parading in a whole litany of witnesses when it's
3 really the argument itself and it's not a dispute over the dates?

4 CDC[MR. COOMBS]: Correct, so I think certainly what I can do is
5 put together the list of questions the government responds to; it
6 shouldn't be very long. They've documented when they did certain
7 things. They can respond to those questions and based upon that
8 response in an affidavit standpoint, then that would be the factual
9 basis that we could launch our argument from.

10 MJ: All right.

11 TC[MAJ FEIN]: Your Honor, may we just have a quick comfort
12 break and recess before we ----

13 MJ: Yes, we definitely will do that, and I want you all to
14 talk during that recess, too, because, again, if this goes forward
15 and falls apart we're going to be, you know, next Friday calling
16 people and we probably will be punting into the Article 13 session,
17 so this is what -- what I'm hearing and what I think is happening is
18 this is not an argument about dates; this is an argument about big
19 pie, little piece; dates are just dilatory and there's a speedy trial
20 violation, but it's not really an argument over the dates.

21 CDC[MR. COOMBS]: Right, and it's just nailing down because I've
22 received different versions, nailing down the actual bottom ground
23 truth and if the government in affidavit form says here is the

1 definitive answer to your questions, then anything that would be
2 inconsistent before will no longer be used. It was something they
3 might have argued in a motion or representation that they made; then
4 we actually have their bottom line truth, facts in affidavit form. I
5 think that would be sufficient because we'd launch from that with our
6 diligence argument.

7 MJ: Well that's certainly applicable to the court. It's a
8 little bit like my M.R.E. 801(d)(2)(D) ruling that, you know, it will
9 allow the government to have a chance to think about it, to go back
10 and check their facts, and not be an utterance in oral argument or in
11 an 802 conference. So if that's satisfactory to the parties, I think
12 that is a much better option than calling this litany of witnesses.

13 CDC[MR. COOMBS]: The only exception to that would be the OCAs,
14 which I know we have a factual -- Major Fein has said that that was
15 the small slice. His words were "a small slice of the overall pie,"
16 but when you look at the -- Colonel Coffman's approval memorandum,
17 every time was almost a cut-and-paste example. Three of the five
18 that he lists are OCA related, and factually the Article 32 clearly
19 could have gone forward with -- even without the representation of
20 the information. Now obviously that would be an argument we make
21 later, but the issue of -- the government indicated that even if the
22 OCAs completed their classification review say in September of --
23 actually say April of 2011, the date when they started submitting the

1 delays of the 32 request, so even if the OCA -- if the OCAs got their
2 classification review done at that date they indicated, because that
3 was a small slice of the overall pie, they still would have delayed
4 the 32 until they apparently got the final amount of information that
5 they believed ----

6 MJ: Which is the 16 November 2011, 380,000 pages of
7 discovery.

8 CDC[MR. COOMBS]: Right. When you look in their filing, they
9 have authorization earlier to disclose the charged documents and that
10 authorization happened before April of 2011. The ----

11 MJ: So what's in this 380,000 pages of ----

12 CDC[MR. COOMBS]: That's the charged documents. I think what
13 the government's representing like, for example, the CCIU reports for
14 the computer forensics, you know, they've indicated here that, well,
15 we didn't get authorization or final approval to turn over the
16 classified CID report until, you know, October time frame.

17 MJ: Is this, this 380,000 pages?

18 CDC[MR. COOMBS]: It is not, Your Honor.

19 TC[MAJ FEIN]: Your Honor, the 380,000 pages are all the
20 classified -- the 19 classified forensic reports on exactly how PFC
21 Manning, or at least the government's position ----

22 MJ: Okay, and I know you're rebuttal, but I want to -- okay.
23 This is the last piece here, and in Number (b), the government is

1 proffering that you wouldn't have gone to trial earlier than December
2 if you had gotten the OGA reviews; is that the government's proffer?

3 TC[MAJ FEIN]: I'm sorry, Your Honor. Can you say that one more
4 time?

5 MJ: I heard you say during oral argument and I just want to
6 clarify that the government would not have gone to -- if you took out
7 that piece of the approval pie of the OGA reviews, the government --
8 if they weren't in any of these delay requests, the government still
9 wouldn't have gone to trial through December and would have relied on
10 the rest of the request.

11 TC[MAJ FEIN]: Through November, yes, Your Honor, because as
12 reflected in November, the very last of these requests it says that
13 we've received everything but one. We anticipate receiving it.
14 Everything else has been completed. We're ready to go.

15 MJ: So what is this: the prosecution disclose such
16 information upon receipt of the Department of the Army's approval.
17 The prosecution recently produced approximately 380,000 pages of
18 discovery, including all charged documents, all forensic reports, the
19 complete unclassified CID file, classification reviews, and two
20 classified military intelligence investigative case files.

21 All charged documents, when was that produced?

22 TC[MAJ FEIN]: Your Honor, the exact date it was produced, I'm
23 looking at Enclosure 18 of the government's **[pause]** -- of the

1 government's response to the speedy trial motion [reviewing document]

2 ----

3 MJ: Mr. Coombs, I'm not trying to interrupt your rebuttal
4 here, ----

5 CDC[MR. COOMBS]: Oh, no.

6 MJ: ---- I just need this information to understand what
7 you're arguing.

8 TC[MAJ FEIN]: Your Honor, on 4 November, the government
9 produced the CID forensic reports, 329,056 pages on 4 November to the
10 defense.

11 MJ: 329,000 how many?

12 TC[MAJ FEIN]: 329,056 pages to the defense on 4 November. On 8
13 November, the government produced a military intelligence
14 investigation; there was three total previously -- no, that was the
15 first of three. Also on 8 November, it produced the charged
16 documents and other evidence, classified evidence, that it intended
17 to use at the 32. Also on 8 November that was -- excuse me, Your
18 Honor, that was a total of 1200 pages. On 8 November, one single
19 unclassified document, one page. Also on 8 November, 448 pages,
20 including the other military intelligence investigations; that was on
21 8 November.

22 MJ: Would the government have gone to the Article 32
23 investigation before it had -- well I assume that -- did it take that

1 long to get the authority; did you disclose it right after you got
2 the authority to do it?

3 TC[MAJ FEIN]: Some of the information, Your Honor, was not
4 necessarily disclosed immediately, but for the forensic reports, that
5 was the last thing we needed to turn over. Some of the charged
6 documents, the approval was received prior to that date, but not all
7 of the charged documents. The forensic reports, they were not --
8 they were not approved ----

9 MJ: The forensic reports were they -- would the government
10 have gone to the Article 32 investigation without the forensic
11 reports?

12 TC[MAJ FEIN]: No, Your Honor, absolutely not. Again, it's the
13 two categories of the most -- of the evidence -- of the major piece
14 of evidence that is required to prove all of the charges. Every
15 single charge is based off of the forensic reports. Only the 793 and
16 1030 offenses are based off of the classification reviews.

17 CDC[MR. COOMBS]: Just real quickly on that one point, Your
18 Honor. The -- this is exactly like Pyburn then, where the government
19 is waiting for laboratory results, in this case forensic results,
20 when they don't need to. The -- when you look at the convening
21 authority's approval month after month after month after the 22nd of
22 April, he lists -- it's almost -- it's a cut-and-paste job and you'll
23 see it in our initial motion, the basis, three of those bases are for

1 OCA, either the classification review or approval to release
2 classified information or the simple request on the defense that we
3 asked for; that was a large piece of the pie and that was the reason
4 that this was held up and, of course, that will be subject to
5 argument, but going to that point of the results, the computer
6 forensic results were the absolute necessity in order to go to a 32.
7 The -- this is exactly like Pyburn. The government would not have to
8 have the computer forensics. They had other proof available to them,
9 maybe not the greatest proof they wanted but they had chat logs that
10 were of -- allegedly of the accused or they had Adrian Lamo who could
11 come testify. The standard at the Article 32, they had enough
12 evidence, a preponderance to go forward on the offenses. The 32 was
13 delayed and the clearest example of this and of course Colonel
14 Coffman can testify to this, but it was delayed because of the OCA
15 classification review process; and when you look at the 25 July
16 response by the defense, we highlight that and we ask why is it
17 taking so long to do the classification reviews and we ask for a more
18 probing of the government of what is the basis; what's the reason
19 why. Now the government is shifting from the OCA to just simply say
20 it's the CCIU forensic reports. We would not have gone forward but
21 for that, so that will be an issue for the court to determine whether
22 or not that was diligent to hold off because then the question shifts
23 from what if the OCAs took 5 years to complete their work to what if

1 CCIU took 5 years to complete their work; and then the question
2 becomes what was the government doing, then, if in fact it took this
3 long for CCIU to complete its forensic examination; what was the
4 government doing to get the CCIU to complete their review. One of
5 the questions you asked was did you disclose -- did you disclose the
6 information as soon as you got authorization and that will be what
7 we'll put into our interrogatory to the government but even their
8 chronology shows they got authorization for the charged documents
9 much, much earlier, and the question then will be and it can be
10 easily verified by looking at the forensic reports when the forensic
11 reports were completed and then if there is another step of
12 authorization to obtain them or hand them over, the question then
13 will be is that diligent of the government to then hold off on the 32
14 waiting for that authority because it's not that atypical to have a
15 32 and then prior to trial get forensic results from a laboratory or
16 from whatnot that would give further evidence to the defense; that's
17 kind of a normal thing. Usually the government prefers charges and
18 jumps right into the 32 anyways. I'm not saying that in this case
19 you would want to do that, but the question becomes is it reasonable
20 to hold off the case 8 months if that's, in fact, the time period
21 that it took, so the defense was concentrating on the OCAs because
22 that's the -- that's the clearest example of the request by the
23 government and then the approval by the convening authority listing

1 the OCAs as three of the five reasons, so obviously a large piece of
2 that pie; and then the fact that the government went and started up
3 the 32 and they -- and even when they put their OPLAN Bravo in, the
4 one caveat was, hey, we should have this last classification review
5 in time, and so from the defense's perspective that was the piece of
6 the pie for 8 months. Now here ----

7 MJ: Now what about what the government talked about that
8 ODNI, DISA, and CYBERCOM didn't do those classification reviews. If
9 I understood you correctly, that wasn't a holdup to the trial; is
10 that correct?

11 TC[MAJ FEIN]: Correct, Your Honor. Those weren't for the
12 charged documents. Those were for how to properly handle them; what
13 we can say on the record, not on the record -- excuse me, ----

14 MJ: So would ----

15 TC[MAJ FEIN]: ---- on the open record or closed record.

16 CDC[MR. COOMBS]: So if the government is proffering that that
17 wasn't a basis to hold up the 32 either, then it just -- those
18 witnesses were just being brought in for the issue of diligence of
19 when the government obtained -- asked for the information, which I
20 think our fix of a interrogatory would give us the information we
21 need to make our argument.

1 TC[MAJ FEIN]: Your Honor, again, it's pretty much being a
2 speedy trial argument, not about witnesses, and that's why we're here
3 today, although if we have this workaround ----

4 MJ: Well I'm looking down here, I mean, for the last
5 witnesses at issue that, you know, who aren't going to be involved in
6 this interrogatory are CENTCOM, GTMO, DoS, and OGA; is that what I'm
7 seeing here?

8 TC[MAJ FEIN]: That is correct, Your Honor.

9 CDC[MR. COOMBS]: Your Honor, if we may, just so we could hash
10 out the interrogatory affidavit part, could we recess briefly ----

11 MJ: Certainly.

12 CDC[MR. COOMBS]: ---- and then maybe come back on the record,
13 finish argument, ----

14 MJ: Okay.

15 CDC[MR. COOMBS]: ---- and give you an update.

16 MJ: Well we can do this -- I mean, how do you want to -- I'm
17 fine with going late if you all want to take a longer recess to
18 figure this out or do you want to take just a short recess now and
19 come back on the record tomorrow; what do you want to do?

20 TC[MAJ FEIN]: The government prefers to finish tonight, Your
21 Honor, ----

22 MJ: Okay.

23 TC[MAJ FEIN]: ---- with the court ----

1 MJ: How long of a recess do you need?

2 TC[MAJ FEIN]: Could we do a 15-minute recess and we'll update
3 you in chambers if -- or ask if we can have more time if we need more
4 time?

5 MJ: All right, that's fine. Again, we have a gallery with
6 people in it, so just make sure that they're aware of what -- how
7 long the recess will be.

8 TC[MAJ FEIN]: Yes, Your Honor.

9 MJ: Court is in recess.

10 **[The Article 39(a) session recessed at 1718, 18 October 2012.]**

11 **[The Article 39(a) session was called to order at 2047, 18 October**
12 **2012.]**

13 MJ: This Article 39(a) session is called to order. Let the
14 record reflect all parties present when the court last recessed are
15 again present in court.

16 I noticed setting the time between 19 and 1930 was a
17 little ambitious today. The parties have conferred and have
18 recommended a plan to the court with respect to speedy trial.

19 Would either side like to address it?

20 TC[MAJ FEIN]: Your Honor, during this protracted recess, the
21 government and defense met and came to an agreement that we would --
22 both parties would work together to -- or the defense would submit
23 the pros -- to the prosecution certain questions in the form of

1 interrogatories and the prosecution would work to answer those in a
2 form of an affidavit, a sworn affidavit, a sworn statement; provide
3 those back to the defense; probably a period of negotiation between
4 the information would ensue. We also set dates for that information,
5 and that would be in lieu of -- in lieu of -- assuming the answers
6 are adequate in lieu of testimony from essentially all the defense's
7 requested witnesses in their motion except Master Sergeant Carlile,
8 Dr. Sweda, and the four OCAs that would be called for pre-referral
9 purposes, the OCAs of CENTCOM, JTF-GTMO, Department of State, and the
10 OCAs for Specification 3 and 15 of Charge II. The -- that's it, Your
11 Honor.

12 MJ: I believe that the -- wasn't the government going to
13 facilitate -- or the defense was going to talk to Dr. Sweda and ----

14 TC[MAJ FEIN]: Oh, yes, Your Honor.

15 MJ: ---- Sergeant First Class Carlile?

16 TC[MAJ FEIN]: I apologize. Defense is going to -- we are going
17 to assist in getting contact information for Master Sergeant Carlile
18 and Dr. Sweda. Defense is going to reach out to them, and if the
19 defense still needs that -- well still requires their testimony or
20 that information and it can't be also solved by sworn -- excuse me,
21 the interrogatories to the prosecution, then we'll possibly do sworn
22 statements by them, but that will be up to the defense to decide at
23 that point.

1 MJ: All right, and I believe the other recommendation from
2 the parties to the court was to defer ruling on the four
3 classification authorities that you just referenced pending the
4 government's contact with those entities to potentially ----

5 TC[MAJ FEIN]: Yes, Your Honor. Your Honor, the defense is also
6 going to provide the prosecution questions they would want answered
7 by the expected testimony of the OCAs, the four I just read on the
8 record, and the prosecution will work with those OCAs to determine
9 whether they'll answer those or not and the prosecution and defense
10 agreed that the court could defer her ruling until the prosecution
11 came back with whether the appropriate OCAs or their delegates or
12 representatives would answer the questions in their interrogatories
13 or not.

14 MJ: All right.

15 Defense, anything else to add?

16 CDC[MR. COOMBS]: Ma'am, just the dates for that. We did agree
17 that on the 26th the defense would provide the government with the
18 interrogatories; and with regards to the four OCAs, the government
19 would get a response back for the court to make a decision on the 2nd
20 and then, of course, the responses from -- for all the
21 interrogatories will come on the 16th.

22 MJ: All right, and that is correct and we are building that
23 into the court calendar.

1 I'm getting quizzical looks from the government.

2 TC[MAJ FEIN]: Your Honor, may we have a moment?

3 MJ: Yes.

4 **[Pause]**

5 TC[MAJ FEIN]: Yes, Your Honor, we agree and I think the last
6 date was, assuming the OCAs or delegates would provide those answers,
7 the government would have them provided by the 16th of November.

8 MJ: Yes; and what the court has done in light of this is
9 we're going to bifurcate the speedy trial motion. We're going to
10 continue on with the next session. It was scheduled to start on the
11 29th of October, on Monday, and go through the 2nd of November. We
12 are now going to start on Tuesday, the 30th of October, and go still
13 through the 2nd of November and we will hear the government's
14 witnesses for the speedy trial motion. We will also have at that
15 point an up -- a better feel for whether this plan that you all have
16 come up with is going to work and what the position is of the four
17 OGAs at issue and the court will issue a ruling with respect to those
18 four OGAs during that Article 39(a) session at the end of it. And if
19 there's any further litigation that needs to occur in that respect,
20 we'll reopen that at that time.

21 Is there anything else that we need to address with
22 respect to the motion to compel at this time?

23 CDC[MR. COOMBS]: No, Your Honor.

1 TC[MAJ FEIN]: No, Your Honor, except for you might, for the
2 record, explain, you said "bifurcate." You talked about the first
3 portion; the second portion.

4 MJ: The second portion we have the Article 13 session that's
5 going to be a long one; that's scheduled for the end of November, and
6 I don't have my court calendar in front of me. Can you tell me
7 exactly what the date is that that's scheduled to start?

8 TC[MAJ FEIN]: Your Honor, the Article 13 litigation is
9 scheduled to start Tuesday, the 27th of November, through the 2nd of
10 December, and then I think the parties and the court agreed during
11 the R.C.M. 802 conference that actually the speedy trial litigation
12 would resume the following session, starting the 10th of December,
13 the first two days, 10 and 11 December.

14 MJ: Yes, we did. We contemplated, perhaps, starting earlier
15 or trying to add it to the Article 13 session, but we have a lot of
16 witnesses that are going to be coming to testify for that, so it was
17 the, I guess, joint concurrence between the court and the parties
18 that it was better to have those motions held at different times, so
19 the parties agreed we would do the Article 13 motion at the end of
20 November through December session and the remaining portion, whether
21 it be the additional witnesses or just oral argument on -- during the
22 week of the 10th through the 14th of December.

23 Does either side desire to supplement what I just said?

1 CDC[MR. COOMBS]: No, Your Honor.

2 TC[MAJ FEIN]: No, Your Honor.

3 MJ: All right.

4 We also have outstanding -- I have Appellate Exhibit 357
5 in front of me, which are requirements for defense notice under
6 Military Rule of Evidence 505(h)(3), Charged Documents and Witnesses,
7 and what that basically is, is M.R.E., Military Rule of Evidence, 505
8 governs classified information and this appellate exhibit sets forth
9 timelines for the defense M.R.E. 505(h) notices, which are required
10 to trigger approval processes for both witnesses to discuss
11 classified information with the defense, as well as the government
12 for that matter, and what classified information is approved for
13 release during the trial proceedings.

14 Major Fein, would you like to address this?

15 TC[MAJ FEIN]: Yes, Your Honor. Your Honor, dated today, 18
16 October 2012, the first portion is a quick explanation of the law,
17 the law starting with the protective order. The court has already
18 issued Appellate Exhibit 32, and then also then it explains M.R.E.
19 505 and the applicable law under M.R.E. 505(h)(1) and the notice
20 requirement along with the *in camera* proceeding requirements under
21 M.R.E. 505(i). Under subparagraph 2, the title "Outstanding Notice
22 Requirements in Accordance with the Protective Order and M.R.E. 505,"
23 what the prosecution submitted here for the defense to ensure that

1 there is enough -- or to outline why information -- why certain
2 information is required by the prosecution in order to process this
3 request, the prosecution outlined three different areas of notice and
4 specifically what type of notice and that's in subparagraphs (a),
5 (b), and (c) and it is all three paragraphs since you highlight the
6 specific information the defense intends to either elicit or disclose
7 and to what individual it is and then it is both for the defense
8 witnesses and the prosecution witnesses and that is a summary of
9 those three paragraphs.

10 Subparagraph -- or Roman numeral III, the importance of
11 adequate notice, in this paragraph the prosecution explains the
12 importance of providing that notice with specificity so the
13 prosecution can actually process the request through the different
14 government agencies.

15 And Roman numeral -- paragraph Roman numeral IV,
16 procedural steps, it's a four-step process, although as the defense
17 highlighted in the R.C.M. 802, step 1 and 2 is really a 1(a) and
18 1(bravo) step, and those are the four steps that the prosecution lays
19 out of what the defense would need to do with their notice and what
20 the prosecution would need to in response to that notice in order to
21 get the approvals to use it; or if the classified information
22 privilege is invoked, the procedures required by the prosecution,
23 including the timelines, so such as once information is identified by

1 the defense and if the classified information is -- the defense
2 intends to disclose it to a civilian individual who does not have a
3 clearance outside the U.S. Government that it will likely take a
4 minimum of 60 days to process just a security clearance for that
5 individual, if they're even eligible for one, and then concurrently
6 there will be the approval process to disclose that information after
7 some form of a classification review would need to occur, unless it's
8 information that already has a classification review, such as the
9 charged documents.

10 Under subparagraph or Roman numeral V, requested
11 timeline, this is based off of the constraints listed above and the
12 procedural steps listed above. This is what the prosecution offers
13 as the requested timeline for these disclosures. Under the first
14 subparagraph, the prosecution requests a 26 October 2012 suspense for
15 the defense to notify the prosecution of the information the defense
16 intends to discuss with its own witnesses during interviews and
17 notice of classified information the defense intends to elicit from
18 its own witnesses during trial.

19 Going to the next paragraph, the prosecution requests a
20 16 November 2012 suspense for the defense to notify the prosecution
21 of the classified information the defense intends to discuss with
22 prosecution witnesses during interviews, as well as notice of

1 classified information the defense intends to disclose during the
2 trial through witness testimony.

3 Finally, Your Honor, based off of those two dates and the
4 constraints listed above, the prosecution recommends that any 505(i)
5 filings, that's a 505(i) for the *in camera* proceeding filings be
6 scheduled for 11 January 2013 with responses due on 18 January 2013
7 and any litigation during that *in camera* proceeding, if required,
8 would occur on 28 to 29 January 2013.

9 MJ: All right, the parties and I held an R.C.M. 802
10 conference right before coming on the record today. The defense had
11 reviewed the submission by the prosecution and this recommended
12 timeline.

13 Mr. Coombs, what is your position?

14 CDC[MR. COOMBS]: Ma'am, I do believe that the timeline that is
15 laid out here is an achievable one. The only issue is going to be
16 ultimately after interviewing the witnesses giving the government
17 notice of what classified information we intend to elicit. That one
18 time period is really kind of fluid and based upon the availability
19 of the witnesses that we'll need to interview. However, the first
20 two time periods, the 26 October and the 16 November, I certainly
21 will meet the 26 October and we will exceed -- or not exceed, we'll
22 beat the 16 November timeline as soon as we get the notice of the
23 government, we'll turn that right back to them, so then it's just a

1 matter of interviewing the witnesses to give the government the
2 further notification of what classified information we intend to
3 elicit.

4 MJ: So the government's going to give the defense, then, some
5 further specificity on what the government is intending on alleging
6 -- or on eliciting from these witnesses; is that correct?

7 TC[MAJ FEIN]: Yes, Your Honor. The government agreed that
8 we'll do a supplemental witness file -- witness list filing to the
9 one that was filed this Monday and we'll do a -- it will be a
10 classified filing to provide the defense very specific information,
11 as specific as we will be able to get with the different documents,
12 if there's documentary evidence, and if it is just oral testimony we
13 intend to elicit, the category, the left and right limits of that
14 testimony we intend to elicit.

15 MJ: All right.

16 And, PFC Manning, we have, you know, a speedy trial
17 motion on the table. I know you've asked for a speedy trial. We are
18 right now -- I am going to keep the case calendar as it is, and if it
19 needs to be modified, we'll have to -- we'll continue to look at it
20 at each Article 39(a) session that we continue to have in this case
21 and we're going to have several coming up, so the parties will notify
22 the court expeditiously if they believe for any reason that this

1 trial schedule with the trial starting on the 4th of February cannot
2 be maintained; is that -- both sides on notice of that?

3 CDC[MR. COOMBS]: Yes, Your Honor.

4 TC[MAJ FEIN]: Yes, Your Honor.

5 MJ: Okay, is there anything else that we need to address
6 before we recess the court? The updated court calendar will be added
7 as the next appellate exhibit.

8 TC[MAJ FEIN]: No, Your Honor.

9 CDC[MR. COOMBS]: No, Your Honor.

10 MJ: Court is in recess.

11 **[The Article 39(a) session recessed at 2102, 18 October 2012.]**

12 **[END OF PAGE]**

1 [The Article 39(a) session was called to order at 1138, 7 November
2 2012.]

3 MJ: This Article 39(a) session is called to order. Major Fein?

4 TC[MAJ FEIN]: Your Honor, all parties present on the court last
5 recessed are present with the exception of the following: Captain
6 Morrow is present, Staff Sergeant Foy, court reporter, is absent, and
7 Mr. Dennis Robertshaw is present as court reporter and has been
8 previously sworn.

9 MJ: All right. Did you. I'd like to begin by going over some
10 issues that have occurred since the last Article 39(a) session on 17
11 and 18 October 2012.

12 First of all, on the 26th of October 2012, I held a
13 telephonic R.C.M. 802 conference with counsel. Once again, under
14 Rule for Court-Martial 802, that rule provides that the court may
15 hold conferences, telephonically or otherwise, in chambers with
16 counsel to discuss, with logistics, scheduling, and other such
17 issues. And, when we hold an R.C.M. 802 conference we put it on the
18 record at the next session which is today. At that telephonic R.C.M.
19 802 conference, we discussed the logistics due to Hurricane Sandy's
20 impending arrival. This proceeding was initially scheduled to begin
21 on the 30th of October and go through the 1st of November of 2012.
22 After we held the R.C.M. 802 conference, I sent the parties an email

1 that synopsized what occurred and invited both sides to add their
2 comments and that email states as follows:

3 This email synopsis was discussed during today's
4 telephonic R.C.M. 802 conference; both parties may supplement the
5 record. Although not discussed at the telephonic R.C.M. 802
6 conference, government please update the case calendar with new dates
7 and send to the parties. The court scheduled a telephonic R.C.M. 802
8 with the parties on 26 October 2012 at 1430 to discuss logistics for
9 the Article 39(a) session scheduled 30 October 2012 through 1
10 November 2012, in light of the arrival of Hurricane Sandy. Present
11 at the R.C.M. 802 conference were myself, Major Fein, Captain
12 Overgaard, and Captain Morrow for the government; Mr. Coombs and
13 Captain Tooman for the defense. Both parties consented to
14 participating in the telephonic R.C.M. 802 conference. The following
15 issues were discussed:

16 1. Fort Meade was canceling schools on Monday and Tuesday
17 which would be the 29th and 30th of October; essential personnel
18 only. The storm is predicted to be massive and the National Capital
19 Region is at risk of losing power.

20 2. The Court, with the concurrence of both parties, will
21 continue the Article 39(a) session to 7 and 8 November 2012 starting
22 at 11 o'clock on 7 November 2012. The witnesses scheduled to testify

1 at this Article 39(a) session are available on the 7th and 8th of
2 November 2012.

3 3. The government requested that Colonel Coffman testify
4 telephonically for the Article 13 motion so he does not have to
5 remain TDY from Afghanistan for 5 weeks. The defense had no
6 objection.

7 The government supplemented the court's synopsis of the
8 R.C.M. 802 conference, also on the 26th of October 2012, stating that
9 all parties agreed to push through and plan on working late hours on
10 7 and 8 November.

11 Does either side desire to supplement the Court's synopsis
12 of the 802 conference?

13 CDC[MR.COOMBS]: No, Your Honor.

14 TC[MAJ FEIN]: No, Your Honor.

15 MJ: And the Court will take judicial notice that Hurricane
16 Sandy did arrive, the federal government was closed on the 30th and
17 the--or the 29th and 30th of October 2012, as were the National
18 Capital Region airports.

19 All right, the government provided a number of notices
20 during the period between 18 October and today. Major Fein, would
21 you like to say, for the record, what those have been?

22 TC[MAJ FEIN]: Yes, Your Honor. Your Honor, on the 22nd of
23 October 2012, the government provided notice to the Court and

1 reference to the Department of Homeland Security and that notice was
2 to notify the Court that all information was one document, but the
3 one document that the Court had previously ruled to approve
4 redactions had been made available for inspection and were produced
5 to the defense by that date.

6 Your Honor, also----

7 MJ: And is that an appellate exhibit?

8 TC[MAJ FEIN]: I'm sorry, Your Honor, yes, it's been marked as
9 Appellate Exhibit 378.

10 MJ: Okay.

11 TC[MAJ FEIN]: Your Honor, also, on the same date, 22 October
12 2012, what has been marked as Appellate Exhibit 364, the government
13 provided notice to the Court in reference to the Department of State.
14 And, similarly, in that notice, the prosecution notified the Court
15 that all approved limited disclosure documents that had been approved
16 by the court for redactions have been made available for inspection
17 and would be produced to the defense for their actual possession and
18 use, but for the ones that must remain at the Department of State.
19 And, again, that was as of the 22 October date.

20 Your Honor, on the 25th of October 2012, what has been
21 marked as Appellate Exhibit 363, the government provided notice to
22 the court in reference to three different entities dealing with
23 discovery and that was the FBI, Department of State, and Department

1 of Homeland Security. Similar to the previous notices, these notices
2 also captured the documents being made available for inspection or
3 produced to the defense for those three entities.

4 Your Honor, on the 26th of October, the government filed a
5 Military Rule of Evidence 505(g) motion--an *ex parte*, classified
6 motion, which I know the Court will discuss later, and that has been
7 marked as Appellate Exhibit 368.

8 MJ: Now, was that the classified motion or the--there was a
9 redacted, unclassified motion----

10 TC[MAJ FEIN]: Correct, Your Honor.

11 MJ: ----that also went into the record, is that correct?

12 TC[MAJ FEIN]: Yes, Your Honor, what has been marked as
13 Appellate Exhibit 368 was the original, classified *ex parte* motion
14 filed via SIPRNET to the court and then, additionally, on that day,
15 what has been marked as Appellate Exhibit 365 is the government
16 unclassified, redacted version for the defense of the exact--of the
17 same motion.

18 Your Honor, yesterday, on 6 November 2012, what has been
19 marked as Appellate Exhibit 377--the government provided notice to
20 the Court and the defense about the status of the final damage
21 assessments prepared by the national--Office of the National
22 Counterintelligence Executive and specifically, based off the Court's
23 previous ruling of the draft assessment, the court required the

1 prosecution to notify the court and defense of the final status if
2 the document was finalized and, in this notice, the prosecution
3 notified the Court and defense that it had been finalized and the
4 version the defense reviewed when they went to the Office of the
5 Director of National Intelligence to review this document was the
6 final version with the redactions the Court had previously approved
7 applied to that version and that there was no substantive change to
8 the final damage assessment compared to the one the Court originally
9 reviewed.

10 MJ: Was there also a due diligence filing?

11 TC[MAJ FEIN]: Yes, Your Honor, there were also two corrected
12 copies motions filed with the Court. The very first one, Your Honor,
13 on 25 October 2012, the prosecution filed a corrected copy of the due
14 diligence filing. This was a corrected copy to correct
15 classification markings and certain paragraphs and that the original
16 was filed and the corrected copy supplements what has been marked as
17 Appellate Exhibit 264. And then, similarly, Your Honor, on the 23rd
18 of October 2012, the government filed a corrected copy of the
19 government's response to the speedy trial--the defense's speedy trial
20 motion and that has been marked as Appellate Exhibit 339.

21 MJ: All right. Since we are talking about things that the
22 government has filed, has the government filed anything additionally
23 with respect to the speedy trial motion? Is there an Enclosure 80?

1 TC[MAJ FEIN]: Yes, Your Honor. May we have a moment, Your
2 Honor? Your Honor, actually, there's two--in the same corrected
3 copy, the government also filed three additional enclosures. That
4 was enclosure 77, 78, and 79 that was annotated in the corrected
5 copy--just referenced what is now--or was Appellate Exhibit 339 and
6 then, this morning, the government also provided the defense and the
7 Court what has been labeled as enclosure 80 to the government's
8 response to the speedy trial. And, after this session, the
9 government will file a second corrected copy just to add the extra
10 line of Enclosure 80 annotated on the list.

11 MJ: Okay. Now, defense, you advised the Court that you would
12 not be moving to compel additional witnesses for the Article 13
13 motion. I believe early--at an earlier session the defense had filed
14 an initial motion to compel, is that correct?

15 CDC[MR.COOMBS]: That is correct, Your Honor. That is marked as
16 Appellate Exhibit 242 and also, within Appellate Exhibit 260 and
17 Appellate Exhibit 329. 242 is the Defense Motion to Compel
18 Production of Witnesses for the Article 13. Appellate Exhibit 260 is
19 the Supplemental Motion to the Article 13 which listed additional
20 witnesses. And, then, Appellate Exhibit 329 is the Defense Addendum-
21 -or Additional Request Witnesses; I listed two additional witnesses
22 on that day. Those were the various exhibits that were filed. Based
23 on the witnesses the government has agreed to produce from our

1 witness list and on the witnesses that the government is producing,
2 itself, the defense, at that point, withdrew its request to compel
3 the witnesses that were not either on the list the government was
4 producing from ours, or that was on their list that they intended to
5 produce.

6 MJ: Mr. Coombs, you had emailed me notice that you were not
7 going to compel additional witnesses. Has that been marked as an
8 appellate exhibit?

9 CDC[MR.COOMBS]: I have not reduced to writing, Your Honor, but,
10 for the record, the defense would indicate that we're withdrawing the
11 request to actually compel witnesses that the government, at this
12 point, has not produced.

13 MJ: All right. There was an email exchange that went back and
14 forth between the parties and the Court was included and the final
15 email in that exchange, on 23 October 2012, was from Major Fein and
16 it said that the United States will have the following witnesses,
17 along with the government's witnesses available: Colonel (Retired)
18 Daniel Choike--am I pronouncing that correctly?

19 TC[MAJ FEIN]: Choike, Your Honor.

20 MJ: Commander Han Buoi, Colonel Robert Oltman, Captain William
21 Hocter, Colonel Rick Malone, Captain Kevin Moore, and Lieutenant
22 Colonel Dawn Hilton, telephonic. Is that the parties' agreement of

1 the witnesses that will be produced in addition to the government
2 witnesses?

3 CDC[MR.COOMBS]: That is correct, Your Honor.

4 MJ: Okay. And those are the only witnesses you want?

5 CDC[MR.COOMBS]: That is correct, Your Honor.

6 TC[MAJ FEIN]: Yes, Your Honor.

7 MJ: And the defense has also provided the government with
8 notice under Military Rule of Evidence 505(h); I have that dated 26
9 October 2012. Has that been marked as an appellate exhibit?

10 CDC[MR.COOMBS]: It has, Your Honor. It is marked as Appellate
11 Exhibit 373.

12 MJ: That would be 372, I believe, is that correct? Or is it
13 373?

14 CDC[MR.COOMBS]: You are correct, Your Honor, 372.

15 MJ: Okay. Any issues with that, Government?

16 TC[MAJ FEIN]: No, Your Honor, we've already started processing
17 the request--or the notice.

18 MJ: Okay. The last session, the--when we were litigating the
19 motion to compel speedy trial witnesses, the motion to compel
20 whittled down to the original classification authority witnesses and
21 the parties agreed to proceed via interrogatory. Defense, have you
22 given the government both interrogatories for the government to fill
23 out as well as for the original classification authorities at issue?

1 CDC[MR.COOMBS]: Yes, Your Honor, and those are marked as
2 Appellate Exhibits 370 and 371. 370 is the interrogatories for the
3 various original classification authorities and 371 is the
4 interrogatories for the government counsel.

5 MJ: All right. Government, any issues with the interrogatories
6 for government counsel?

7 TC[MAJ FEIN]: The government counsel, no, Your Honor. However,
8 the prosecution will--intends to meet with the defense, today, to
9 discuss some of the questions, just based off of it being somewhat
10 confusing.

11 MJ: The government, on the 31st of October 2012, moved for
12 leave of the court until 7 November 2012 to notify the court of the
13 original classification authority entity responses to the defense
14 interrogatories; basically, whether they--these agencies were going
15 to respond to the defense interrogatories. Has that been marked as
16 an appellate exhibit?

17 TC[MAJ FEIN]: Yes, Your Honor, it is marked as Appellate
18 Exhibit 373.

19 MJ: All right. And on the--the defense had no objection to
20 that request for leave. The Court ruled on that on the 1st of
21 November 2012 as follows:

22 On 18 October 2012, the Court ordered the defense to submit
23 proposed interrogatories for certain Original Classification

1 Authority (OCA) to the government by 26 October 2012. The government
2 would, then, notify the Court, no later than 2 November 2012, whether
3 the original classification authority entities would respond to the
4 interrogatories posed by the defense. The court deferred ruling on
5 the Defense Motion to Compel OCA Witnesses for its Motion to Dismiss
6 for Violation of Speedy Trial.

7 The next Article 39(a) session for *US v. Manning*, scheduled
8 30 October through 1 November 2012, was continued to 7 to 8 November
9 2012 by the Court with the concurrence of both parties to avoid
10 logistics challenges caused by the arrival of Hurricane Sandy on the
11 East Coast of the United States on Monday, 29 October 2012. On 31
12 October 2012, the government requested leave of the court until 7
13 November 2012 to provide the court with notice of whether the OCA
14 entities would respond to the defense interrogatories. The defense
15 does not oppose. The government request for leave of the Court until
16 7 November 2012 is granted.

17 So, the government will advise me by the end of today what
18 the status of the OCAs is with respect to this--the interrogatories,
19 is that correct?

20 TC[MAJ FEIN]: Yes, Your Honor, and that-- your ruling has been
21 marked as Appellate Exhibit 374.

22 MJ: Anything additional we need to address with respect to the
23 interrogatories?

1 CDC[MR.COOMBS]: No, Your Honor.

2 TC[MAJ FEIN]: Not this time, Your Honor.

3 MJ: The Court, also, on the 18th of October, had discussed with
4 the government--there are certain classified exhibits that the
5 government moved to not accompany the record of trial and remain at
6 various entities that control these classified exhibits. And the
7 Court ordered the government to come up with a plan to have all of
8 these exhibits maintained by one agency under one custodian with a
9 systematic review process to ensure that these exhibits remain
10 through any appellate review that might occur. The government, on 25
11 October, requested leave until 10 December to provide the detailed
12 plan for maintaining appellate exhibits. Has that been marked as an
13 appellate exhibit?

14 TC[MAJ FEIN]: Yes, Your Honor, Appellate Exhibit 359.

15 MJ: All right. And, on the 26th of October 2012, the court
16 ruled on that request and that has been marked as Appellate Exhibit
17 362?

18 TC[MAJ FEIN]: Yes, ma'am.

19 MJ: And the Court ruled as follows:

20 On 25 October 2012, the government requested leave of the
21 court until 10 December 2012 to provide the court with a detailed
22 plan to maintain the classified appellate exhibits (AEs) that will
23 not accompany the record of trial.

1 On 5 October 2012, the Court ordered the government to
2 present to the court no later than the 39(a)--the Article 39(a)
3 session scheduled to begin on 30 October 2012 it planned to maintain
4 classified appellate exhibits not accompanying the record of trial in
5 one location under the custody of one custodian with a systematic
6 periodic review to ensure accountability at the appellate exhibits to
7 any appellate review. The defense does not oppose.

8 The government request for leave of the Court to 10
9 December 2012 is granted.

10 Now, Mr. Coombs, the--at the last Article 39(a) session,
11 the defense filed a notice of plea and forum. The defense has since
12 supplemented that notice with an additional filing. Would you like
13 to explain, on the record, what the defense has filed?

14 CDC[MR.COOMBS]: On 15 October, we filed Appellate Exhibit 342
15 which was a notice of plea and forum and expected motions. On that
16 day, PFC Manning gave notice of his intent to accept responsibility
17 for providing certain charged information to WikiLeaks. He
18 indicated, on that day, that he was intending to plead to lesser
19 included offenses within the charge sheet. On the 23rd of October,
20 Appellate Exhibit 360--the defense revised its notice of plea and
21 forum because, at the time that we filed 342, it was just stating
22 that he would plead lesser included offenses. The Court and the
23 government and the defense, in an 802 session, discussed the

1 requirement to lay out the actual specification that he would be
2 pleading to that would be the lesser included offense and so 360 was
3 the defense's effort to do so. At that time, what made the most
4 sense to the defense was to actually have PFC Manning, based upon his
5 representations to us, plead by exceptions and substitutions.

6 The Court, then, after receiving that, requested the
7 defense to file it believed would be the maximum punishment based
8 upon proffered plea by PFC Manning. That was provided to the Court
9 on 25 October as Appellate Exhibit 361.

10 Then, on the 26th of October, the Court issued a
11 clarification of its ruling, initially, that was filed on 19 July and
12 that was Appellate Exhibit 219, the 19 July ruling. The
13 clarification was Appellate Exhibit 366. Based upon that
14 clarification, the Court requested the defense respond to certain
15 questions and have the--both the defense and the government brief on
16 those questions. The government provided its brief at Appellate
17 Exhibit 375 which is their response to the Court's ruling.

18 MJ: The government or the defense?

19 CDC[MR.COOMBS]: Excuse me, ma'am, I misspoke. The defense
20 provided, at Appellate Exhibit 375, the government still has a time
21 period in order to respond.

1 MJ: All right. Thank you. And, for the record, based on the
2 submissions by the defense, specification by specification, the Court
3 issued a ruling on the 26th of October 2012 as follow:

4 On 19 July 2012, the Court issued a ruling regarding the
5 maximum punishment for specification one of Charge II and for the
6 lesser included offense theories under Clause I and Clause II of
7 Article 134 for the offenses charged under all three clauses of
8 Article 134, that would be 18 United States Code, Section 641; 18
9 United States Code, Section 793(e); and 18 United States Code,
10 Section 1030(a)(1).

11 The maximum punishments in that ruling assumed that the
12 lesser included offenses under Clauses I and II would include all of
13 the elements charged except the Clause III statute, where applicable.
14 In the litigation culminating in the 19 July 2012 ruling, the court
15 was not requested to and did not consider the maximum punishment for
16 any Clause I or II offense or guilty plea involving a residuum of the
17 elements charged.

18 On 15 October 2012, the defense filed a notice of plea,
19 forum, and expected motions. On 23 October 2012, the defense email
20 the Court a Defense Revised Notice of Plea and Forum that is
21 different from the 15 October 2012 submission in that it proffers
22 pleas involving a residuum of elements. On 23 October 2012, via
23 email, the court ordered the defense to provide a specification by

1 specification breakdown of the maximum punishment, by specification,
2 based on the proposed defense plea. On 25 October 2012, the defense
3 emailed the Court the defense calculation of maximum punishment with
4 the calculations reached relying on the Court's 19 July 2012 order.
5 This reliance was misplaced as the 19 July 2012 order does not
6 address Clause I and II lesser included offenses with a residuum of
7 elements as contemplated by the accused's proffered pleas.

8 18--on 18 October 2012, the Court, in consultation with the
9 parties, established the following suspense dates for filings
10 regarding the accused's proffer pleas the maximum punishments based
11 on the accused's proffer pleas: 5 November 2012, filing; 16 November
12 2012, response; 23 November 2012, reply. Any litigation involving
13 the accused's proffer pleas is scheduled to be addressed during the
14 Article 39(a) session 27 November 2012 to 2 December 2012.

15 Ordered: The parties will address the following issues in
16 their filings regarding the accused's proffer pleas specification by
17 specification:

18 1. Is the proffered plea a lesser included offense of the
19 charged offense or does it contain amendments to the specification
20 requiring convening authority approval to be a referred offense?
21 *United States v. Morton*, 69 MJ 12, Court of Appeals for the Armed
22 Forces, 2010.

2. Assuming the Court accepts the proffered plea as lesser included offense of the charged offense or the convening authority approves amendment of the specification, what is the maximum punishment for each specification in accordance with the accused's proffered plea in accordance with Rule for Court-Martial 1003(c)(1)(b) and *United States v. Beaty*, 70 MJ 39, Court of Appeals for the Armed Forces, 2011.

So ordered this 26th day of October 2012.

The Court has the defense filing. The government has until the 16th of November to have its filing and the Court will address any issues with respect to the content of the proffered pleas on the next Article 39(a) session and we'll go over the accused's plea and forum on the Article 39(a) session scheduled for the 10th through the 14th of December.

Does either side have anything further to add?

CDC[MR.COOMBS]: No, Your Honor.

TC[MAJ FEIN]: No, Your Honor.

MJ: Let's turn, now, to the government's *ex parte* 505(g) motion. That was a classified motion. There is an unclassified motion that was also filed. What the government like to address the substance of that motion?

TC[MAJ FEIN]: Yes, ma'am. Ma'am, on 26 October 2012, in what has been marked as Appellate Exhibit 368 for the original, classified

1 ex parte filing--or--and Appellate Exhibit 365 for the unclassified,
2 redacted version of the prosecution's filing. Prosecution filed an
3 M.R.E, Military Rule of Evidence, 505(g)(1) and (g)(2) request. As
4 the court knows, M.R.E. 505(g)(1) regulates a voluntary disclosure of
5 classified information--or allows the court to regulate the
6 government's voluntary disclosure of information. 505(g)(2) is
7 authorizing substitutions or alternatives to the original classified
8 information. The government filed this motion in regard to three
9 pieces of digital media that the government intends to use
10 information that was contained on the media during its case-in-chief
11 and sentencing case.

12 And the purpose of this motion was to ask the Court to
13 authorize some limitations of the defense's access to the three
14 pieces of digital media. So, only the relevant information that the
15 prosecution intends to use is accessible to the defense because of
16 its highly classified nature. And, as outlined in the motion, both
17 the unclassified, redacted version and the original, classified
18 version, the prosecution believes that there is no information that
19 is relevant or necessary contained, but for the four digital files
20 the prosecution intends to use from the three pieces of digital media
21 and that there is no *Brady* material that exists on the drives and
22 there is no otherwise helpful information to the defense contained on
23 the drives, but for the four files.

1 In addition, Your Honor, the--that's the first part. The
2 second part of the motion is asking the court to approve redactions
3 of two of the files. Two of the files, when printed out, are
4 documents and only the relevant portions of those documents are what
5 the prosecution intends to use. The prosecution has asked the court
6 to approve the redactions of the remaining material in those two
7 documents out of the four total.

8 Finally, Your Honor, the prosecution asks the Court to
9 issue an additional--or an addendum to the original protective order
10 for classified information that requires the defense to only view
11 those four files when they're conducting their forensic review so it
12 allows the defense and their computer forensic experts to still
13 analyze the files to validate whether they are forensically sound
14 files from the original that was--from the original source and that
15 still will allow the defense to properly put on a defense and have
16 their forensic experts analyze it. The protective order would just
17 enforce the limitations based off the substitutions and redactions
18 that the government is asking in the first two parts.

19 MJ: Okay. Let me just--and the protective order that the
20 government wants--also wants this review conducted by the defense in
21 the presence of the court security officer, is that correct?

22 TC[MAJ FEIN]: That is correct, Your Honor.

23 MJ: What is the defense's position?

1 CDC[MR.COOMBS]: Your Honor, the defense would ask the Court
2 actually hold off on making a ruling, at this point, on the
3 government's request. The defense would--the defense and government
4 are going to talk about the nature of their request. Once we have
5 some answers to a few questions, we can tell the Court whether or not
6 we have an objection to the request and, if so, what the nature would
7 be at that time.

8 MJ: Does--at this point, does the defense have an objection to--
9 -I mean, I'm assuming the government, at this point, is going to
10 allow the defense--or wants the defense to review the relevant
11 portions of this evidence.

12 TC[MAJ FEIN]: Your Honor, the government wants--has made it
13 available and wants to continue making the three pieces of digital
14 media available to the defense for their forensic experts to analyze.
15 So, yes, we don't want any delay in the process of this court-martial
16 so we would like a ruling as soon as possible only so the defense can
17 properly plan.

18 MJ: I guess where I'm going with this, Defense--if this
19 protective order that the government wants to allow your forensic
20 expert to review the metadata of these exhibits under the parameters
21 that the government has planned, the defense isn't really going to be
22 in a position to come and tell me whether you have an objection

1 until--unless your forensic expert has a chance to review this under
2 the criteria set forth by the government, is that right?

3 CDC[MR.COOMBS]: In part. One of the issues was just
4 understanding the exact nature of what the government is limiting off
5 the three additional pieces of media and how they selected that
6 information. So, I know they're representing to the court that we
7 hold out information that we intend to either in findings or
8 sentencing and we believe everything else is not relevant the thing
9 that the defense doesn't know--the answer that we don't know is: how
10 did they select that other--how did they make that determination?
11 Did they review all the other information on the three digital pieces
12 of media that they're providing in order to make that determination?
13 And is there an accounting of what's on that? So that's the part
14 where would like to speak to the government counsel to see if there
15 is a way that we can trust that, you know--say a hundred pieces of
16 information were on the three digital pieces of media and they
17 identified four that they want to use. Well, all right. The other
18 96, you know, in general, what are they? And if they can represent
19 that to us, then I think that first concern of the defense would be
20 addressed. Then, the second is just the nature of the forensic
21 review. And, at that point, I think they hybrid solution would be to
22 allow our forensic experts, under the order requested, to conduct
23 their review and if there is some reason why their review is limited

1 in some way, they can inform us of that and we can come to the Court
2 with that. So, the initial confusion and what I'd like to clear up
3 with the government before the court rules is, basically, how they
4 selected the information that they're now asking the court to make
5 the determination that this is all that's relevant, not all this
6 other stuff.

7 MJ: Okay. Does the defense have any objection--I'm--where I'm
8 looking at this is, again, you have data and you have metadata, so
9 the--it's--the protective order is going towards the metadata, if I'm
10 correct. Is that right?

11 TC[MAJ FEIN]: Your Honor, it's--the protective order is really
12 encompassing both only because it's saying you can only look at these
13 four files and the metadata associated with the files because two of
14 the files--if the court approves the redactions of both the documents
15 which would make up two of the files and a forensic expert--I mean,
16 the whole purpose of a forensic expert is to recover information from
17 computers that they could, otherwise, then look at what's behind a
18 redaction when the Court has already approved it. So, the protective
19 order would say, "No, I've approved a redaction. You can't look at
20 the substance of the file, but you can look at the metadata of that
21 file." And that's for two of the files.

22 MJ: Now, with this protective order, if the defense forensic
23 expert goes and looks at these files, are they physically capable of

1 pulling up any redaction--any data that I said should be redacted
2 under the protective order that you have----

3 TC[MAJ FEIN]: May I have a moment, Your Honor?

4 MJ: ----proposed?

5 TC[MAJ FEIN]: I apologize, Your Honor, I'm just looking at
6 what's unclassified to discuss. Your Honor, the--what the
7 prosecution has proposed in order to enable the defense to fully
8 analyze this information is to use one of the industry standard
9 forensic programs that allows a process called "privileging."
10 Essentially, if the Court approves the prosecution's proposed way
11 forward and issues the protective order, then the information, but
12 for those four files, would be privileged out which means that,
13 without additional steps by the forensic experts--and that's why the
14 court security officer would be present--they would not be able to
15 view the contents or even the metadata associated with the other
16 files. As for the two documents out of the four remaining that have
17 redactions that the government has asked the Court to approve, a
18 forensic expert could, with a few clicks in the program, look at the
19 content behind the redactions because the document, itself, is
20 unaltered.

21 If the government went down the road to propose an
22 alteration--actually apply redactions to the digital file, it would
23 actually change the metadata and then the defense security expert--

1 forensic experts wouldn't be able to compare based off the
2 government's experts. So, the government has chosen to not alter the
3 information at all which makes it completely available to the defense
4 forensic expert.

5 MJ: I guess where I'm going with this, Defense--and I
6 understand you want to talk to the government on the content of the
7 data, itself, and whether they searched it and what the--and that's
8 fine, but what I'm looking at is--does the defense, at this point,
9 have any objection to looking at the files under the government's
10 protective order and then if you think that's too onerous or
11 burdensome or you're not getting the metadata that you need, come
12 back to the Court and ask for an amendment of the protective order or
13 a change? I mean, what I want to do is have you look at the files,
14 not wait and then do a response having not seen the files.

15 CDC[MR.COOMBS]: No, I understand. I think the problem, though,
16 Your Honor, is, again, if I understand the government correctly,
17 they've got the three digital files--their pieces of media--and
18 they've pulled from that four files and two of them we can look at
19 completely and the other two they have another protective order
20 requested. Our expert looking at those--they, apparently, want our
21 expert to use a particular program which I know my expert doesn't use
22 and would prefer not to use, but that's a side issue. I think the
23 main issue that we have a problem with, right now, is the request of

1 the government is asking the Court to rule that all this other stuff
2 is not relevant and that's the piece of missing information for the
3 defense--is how do we know that?

4 And so, what I'd like to do is find out from the government
5 how they selected the four pieces because we know in other pieces of
6 litigation the government felt the FBI file wasn't relevant to the
7 defense. Damage assessments were not relevant to the defense. So,
8 that's the concern that the defense has. So, if the government can
9 articulate how they hold the four that they want to use and said
10 everything else on this is not relevant, is not *Brady*, defense should
11 not be able to look at it, I would like to find out how they selected
12 that. And then, if there's an issue with that, raise that to the
13 Court. Then the--I guess the other sliver to that would be, once
14 they did select their four pieces of information, they now want to
15 limit our experts on how they review that with a particular program.
16 That, I need to get with my expert to determine whether or not that's
17 problematic.

18 MJ: What's the timing on this?

19 CDC[MR.COOMBS]: Well, I--if we could talk with the government
20 today to have them inform us in greater detail, then I think it's an
21 issue we could address again tomorrow.

22 MJ: Okay. Any objection to that?

1 TC[MAJ FEIN]: Your Honor, we do not object to talking with the
2 defense. Just--I guess for almost expectation management for the
3 defense and the Court, the process the prosecution followed is
4 outlined for the Court in the *ex parte* portion. We have no approval
5 to discuss the process we followed with the defense, so that will not
6 be resolved if that's the key there. And also, just to highlight,
7 Your Honor, for the Court and the record, we're talking about four
8 files that the defense has actually been in possession of since 3
9 August. So, they've already had--assuming the Court approves the
10 redactions of the two out of four files, the files, themselves, have
11 been turned over in discovery. So, the defense has that information.
12 Again, it's really only----

13 MJ: Now, I'm confused.

14 TC[MAJ FEIN]: Yes, Your Honor.

15 MJ: What does the defense--does the defense have redacted
16 files? Does the defense----

17 TC[MAJ FEIN]: Yes, Your Honor. So, what the defense has, Your
18 Honor, are--there are three pieces of digital media at play and there
19 are four files. Two of the files don't have redactions at all and
20 they were provided to the defense--in their original state to the
21 defense on 3 August.

22 MJ: So those aren't at issue?

23 TC[MAJ FEIN]: Those are not at issue, Your Honor.

1 MJ: Okay.

2 TC[MAJ FEIN]: Well--those are not at issue. There are two--so,
3 out of four files, there are two other files that the prosecution
4 provided to the defense in redacted form on 3 August. Since----

5 MJ: Are those the two documents?

6 TC[MAJ FEIN]: Yes, Your Honor, those are the two documents.
7 Those two documents----

8 MJ: That the Court has an unredacted version of?

9 TC[MAJ FEIN]: Yes, Your Honor.

10 MJ: Okay.

11 TC[MAJ FEIN]: And since 3 August, the defense has not--and,
12 again, going back to the very beginning, this is actually an
13 affirmative M.R.E. 505(g) motion, meaning it's not in response to a
14 defense discovery request, although now there could be or any other
15 time a discovery request. So, because the defense has not filed a
16 discovery request since 3 August for what's behind the redactions,
17 the government, to save ultimate time in this process, is coming to
18 the Court to approve the redactions we've already applied and given
19 to the defense. Now, understanding if the Court rules not to approve
20 the redactions, then that means the defense might receive more
21 information. So, really----

22 MJ: That's with the two documents. Now, what else is left?

1 TC[MAJ FEIN]: That's it, Your Honor; those are the four
2 documents, two with redactions, two without. Two files that are not
3 documents that have been provided in their original form to the
4 defense and then there are two documents that have been provided in
5 redacted form to the defense.

6 CDC[MR.COOMBS]: And then there's a wrinkle of three digital
7 media that, apparently, have other files.

8 TC[MAJ FEIN]: Correct. Yes, Your Honor, and now--so, those
9 four files that are the evidence, came from three different pieces of
10 media which are the subject of the first part of this motion and the
11 protective order. It's the analysis of those three pieces of media
12 which is at issue, here.

13 MJ: Okay. And the government is telling me you can't tell the
14 defense how you determined that the rest of those--whatever is on the
15 digital media is not relevant?

16 TC[MAJ FEIN]: Other than, Your Honor, we conducted different
17 types of searches--I think that's already been put into the filing--
18 conducted multiple types of searches, not the exact way it was
19 searched, to try and find the information. The prosecution did not
20 find *Brady* material or any other type of helpful material.

21 MJ: Can the government tell the defense what search terms you
22 used?

1 TC[MAJ FEIN]: We will look into that immediately, Your Honor,
2 at our next recess and figure out if that's something we can share.

3 MJ: All right. Why don't we go ahead and do that? We'll table
4 that at this point.

5 TC[MAJ FEIN]: Yes, ma'am.

6 MJ: You can confer and get the information that you need.

7 MJ: All right. The main purpose of this Article 39(a) session
8 is to have the government present three witnesses for the speedy
9 trial--Motion to Dismiss for Speedy Trial. Major Fein, would you
10 like to explain, for the record, the order of march proposed by the
11 government?

12 TC[MAJ FEIN]: Yes, Your Honor. Before that, would you like two
13 more filings to be put on the record?

14 MJ: Sure.

15 TC[MAJ FEIN]: First, Your Honor, on 26 October 2010 [sic], the
16 defense filed the next volume, the speedy trial chronology and what
17 should be remaining, now, is the government is currently going
18 through the defense's proposed stipulated chronology to figure out if
19 it is, in fact, in that form or if there's going to be some deletions
20 by the government and so the next should be the final stipulated
21 chronology for the Court by----

22 MJ: All right.

23 TC[MAJ FEIN]: ----tomorrow.

1 MJ: You're going to give that to me tomorrow?

2 TC[MAJ FEIN]: No later than close of the record tomorrow, Your
3 Honor.

4 MJ: Okay.

5 TC[MAJ FEIN]: And then, finally, Your Honor, on the 26th of
6 October 2012--I'm sorry, Your Honor, that was marked as Appellate
7 Exhibit 369, the defense's speedy trial chronology. And then the
8 final filing was on 26 October 2012, what has been marked as
9 Appellate Exhibit 367, a classified filing. That is the Government's
10 Updated Witness List 2. This was filed via SIPRNET to the defense
11 and the Court. This was the result of the defense asking for more
12 specificity on what type of classified information the government
13 intends to elicit from its witnesses both on sentencing and the
14 merits and the government provided a classified version of the
15 witness list providing that additional specificity to aid the defense
16 and providing its required notices under both the protective order
17 and M.R.E. 505(h). And that is all of the filings, Your Honor.

18 MJ: All right. Before I move on to the order of march with
19 respect to speedy trial, any additional issues we need to address?

20 ADC[MAJ HURLEY]: Ma'am, just quickly--in the 26 October filing
21 by the government of the additional information for their witnesses,
22 the defense has, in turn, put a 505(h)(1) notice together and
23 submitted it through its court security officer to the government so

1 that it can begin processing that. The deadline was 16 November
2 2012.

3 TC[MAJ FEIN]: They have, Your Honor. It's not been marked. I
4 think the court security officer--we received it on Monday and we'll
5 have it printed and marked.

6 MJ: Okay.

7 ADC[MAJ HURLEY]: Ma'am, I have signed copies stored with the
8 court security officer that--we can do that.

9 MJ: All right. Then there will be a copy for the Court as
10 well, right?

11 ADC[MAJ HURLEY]: Yes, ma'am. Yes, ma'am, sorry.

12 MJ: So that will be marked as a classified appellate exhibit,
13 then?

14 TC[MAJ FEIN]: Yes, ma'am.

15 MJ: Anything else we need to address before we go into the
16 order of march for the speedy trial motion?

17 CDC[MR.COOMBS]: No, Your Honor.

18 TC[MAJ FEIN]: No, Your Honor.

19 MJ: All right. Why don't you explain for the court how you
20 intend to proceed?

21 TC[MAJ FEIN]: Your Honor, the United States intends to proceed
22 by first calling Lieutenant Colonel Almanza, the investigating
23 officer for the Article 32. He will be a--his testimony will be by

1 telephone. We have contacted him prior to starting the session; he
2 will be available. Before we begin, we would just ask for, probably,
3 a 5-minute recess to ensure that we can connect him on this AV
4 system.

5 Second, Your Honor, after the government--or the United
6 States proposes after taking Lieutenant Colonel Almanza's testimony,
7 the court moves for a lunch break at that point. After the lunch
8 break, then, the United States calls Mr. Bert Haggett from the
9 Department of the Army G2 and the Court takes his testimony at that
10 point. For the remainder of the day, the United States proposes that
11 any other administrative issues be resolved by the COB, today, and
12 then, starting very first thing at 0800 tomorrow morning starting on
13 the record will be the United States Calling Colonel Carl Coffman,
14 the previous Special Court-Martial Convening Authority to take his
15 testimony throughout the day and end the day with the closing of his
16 testimony.

17 MJ: All right. Any objection to that order of march?

18 CDC[MR.COOMBS]: No, Your Honor.

19 MJ: Okay. Why don't we go ahead and put the court in recess
20 now? Make it about--let's make it 10 minutes. If you have any
21 issues on connectivity or he's--I know he's got--he's in the middle
22 of some kind of scheduling----

23 TC[MAJ FEIN]: Yes, ma'am.

1 MJ: ----issues--and you want to get started earlier, just come
2 get me.

3 TC[MAJ FEIN]: Yes, ma'am.

4 MJ: Court is in recess.

5 [The Article 39(a) session recessed at 1226, 7 November 2012.]

6 [The Article 39(a) session was called to order at 1238, 7 November
7 2012.]

8 MJ: This Article 39(a) session is called to order. Let the
9 record reflect all parties present when the court last recessed are
10 again present in court. Is the government ready to proceed?

11 ATC[CPT WHYTE]: Yes, ma'am. The United States calls Lieutenant
12 Colonel Paul Almanza.

13 LIEUTENANT COLONEL PAUL ALMANZA, U.S. Army, was called as a
14 telephonic witness for the prosecution, was sworn, and testified as
15 follows:

16 DIRECT EXAMINATION

17 Questions by the assistant trial counsel [CPT WHYTE]:

18 Q. Sir, You are Lieutenant Colonel Paul Almanza,
19 Administrative Law Judge, Social Security Administration and also----

20 A. I am----.

21 Q. And also, the Article 32 investigating officer in this
22 case?

23 A. I am.

1 Q. Sir, where are you currently?

2 A. I am currently at my office at the Social Security
3 Administration in Falls Church, Virginia.

4 Q. And, are you in a location where you are able to speak
5 freely?

6 A. Yes, in my office with the door closed, nobody else is with
7 me.

8 Q. Do you have any notes in front of you, sir?

9 A. No, I do not.

10 Q. Okay sir, if any issues arise during this testimony that
11 would prevent you from testifying freely, please just let the Court
12 know.

13 A. Will do.

14 Q. Okay, sir, I just want to start off with little bit of
15 background information; first, with your military career. Can you
16 please just provide a brief overview of your military career?

17 A. I was in ROTC cadet; I then joined the Army Reserve. After
18 college I was in law school. I was a Military Intelligence officer
19 until 1996 when I went onto active duty as a Judge Advocate. I was
20 on active duty as a judge advocate for approximately 5 years. And
21 then, in May of 2001, I transferred back to the Army Reserve and have
22 been a Judge Advocate in the Army Reserve since then.

1 Q. Okay sir, when you were on active duty, what positions did
2 you hold?

3 A. I was a trial counsel, I was an administrative law
4 attorney, I was trial defense counsel, I briefly was a trial counsel
5 again and then my last assignment was at Government Appellate
6 Division.

7 Q. Okay sir, and what about when you were in your reserve
8 capacity? What were some of the positions that you held?

9 A. In my reserved capacity as a Judge Advocate, I worked for
10 the Government Appellate Division for a number of years. And, for a
11 year I supported the INSCOM SJA office. Then, I joined the reserve
12 unit that supports the Army Trial Judiciary and was essentially a law
13 clerk for a couple of years and then in 2010, became a reserve
14 military judge.

15 Q. And, how long have you been a reserve military judge?

16 A. Since June of--May of 2010.

17 Q. Sir, and roughly how many court-martials[sic] have you
18 presided over, sir?

19 A. Approximately six; BCD/guilty pleas.

20 Q. Okay, and what type of training did you receive in becoming
21 a military judge?

22 A. I attended the Military Judge's Course in Charlottesville.

23 Q. Okay, and how long was that course, sir?

1 A. It is a three week course.

2 Q. And, did the training include any discussions about
3 excluding periods of delay under R.C.M. 707?

4 A. Yes.

5 Q. Okay sir, can we move forward to your--or, move aside to
6 your civilian career; what is your current position?

7 A. I am an administrative law judge with Social Security.

8 Q. And how long have you been in that position?

9 A. I started here in mid-September. My first day was
10 September 24th.

11 Q. And, sir, what was your--where did you work before joining
12 the Social Security Administration?

13 A. I was with the Department of Justice.

14 Q. And, for how long, sir?

15 A. I was there for approximately 10 years.

16 Q. And, give us a basic overview of what kind of positions you
17 have held there?

18 A. I was a trial counsel and investigative chief in the child
19 exploitation and obscenity section. And, between 2007 and 2010, I
20 was the Chief at the Department of Justice, for legal policy. And
21 then, in 2010, I went back to the Child Exploitation and Obscenity
22 Section where I was the Deputy Chief. From February 2012 to my
23 leaving, I was on detail from the Child Exploitation and Obscenity

1 Section to the Deputy Attorney General's office to work on child
2 exploitation issues.

3 Q. Okay, sir, if we could just transition to your involvement
4 in this case. You testified earlier that you were the Article 32
5 investigating officer?

6 A. Correct.

7 Q. In that role, were you required to get a security clearance
8 for this case?

9 A. I was required--I had a security clearance, so I was
10 required to get read on for this case.

11 Q. Okay, sir, and do you remember when the Article 32 actually
12 took place, roughly?

13 A. It was in December of 2011.

14 Q. Okay, sir. And, did you submit your report to the Special
15 Court-Martial Convening Authority within the suspense timeline?

16 A. Yes.

17 Q. And, were you on active duty during the Article 32
18 investigation?

19 A. I was on active duty during the time of the hearing. I was
20 on orders during the time of the hearing from--leading up to, I think
21 it was 12 December to 23 December, I was on orders. And then I again
22 was on orders from 3 January to the 6th of January. And, the
23 remainder of my time, I worked in what is called an active duty

1 status, when reservists work not on orders but are working for pay.
2 That is an active-duty status. And, I was on an active-duty status
3 from 9 January 2012, to 11 January 2012.

4 Q. Yes, sir, and during that time, you still, in your civilian
5 capacity, you were still at the Department of Justice?

6 A. Correct.

7 Q. And, what was your position during that time, sir?

8 A. I was the deputy chief in the child exploitation and
9 obscenity section.

10 Q. Okay, so while acting as the Article 32 investigating
11 officer, did you exclude any periods of delay?

12 A. Yes, if I recall correctly, I excluded the three days
13 around Christmas, it was a two-day weekend and the holiday; the three
14 days around New Year's to be kind of a holiday; the weekend of, I
15 believe it was the 8th and 9th of January; and then, the four
16 workdays between Christmas and New Year's.

17 Q. Okay, Lieutenant Colonel Paul Almanza, can we first just
18 start with that first period of delay. I think you referenced 24
19 December through 2 January?

20 A. Correct.

21 Q. So, the Article 32 investigation concluded on 22 December,
22 what did you do with the following day on 23 December?

1 A. I went down to MDW and was reviewing evidence. Because of
2 the nature of the case, the evidence was provided to me on a laptop
3 that was classified at the Secret level. So, I could only review the
4 evidence in this case on that laptop which was secured at MDW. So,
5 and that was a Friday. Chief Ford was down there because he had to,
6 you know, provide me the laptop when I started working in the morning
7 secure it at the end of the day in the safe at MDW.

8 Q. So, sir, it is safe to say the only time that you reviewed
9 evidence was at Fort McNair?

10 A. Correct.

11 Q. Okay, it just to confirm, why was that, sir, why did you
12 not review evidence at home or at work?

13 A. Because it was all on a classified laptop.

14 Q. Okay, sir. So, again, for that period that you testified
15 earlier that 24 to 26, that was the weekend and also a federal
16 holiday and then from the 27th to the 30th, that was a workday and
17 then 31 to 2 that was another federal holiday for the new year?

18 A. Correct.

19 Q. Okay sir, so what happened between 27 to 30 December?

20 A. I was working at DOJ. I was the deputy chief there, my
21 assistant deputy chief was on prior scheduled annual leave and my
22 boss had asked that I be available to cover her portfolio if she was
23 going to be out. And, she was out so I went in to work those days.

1 Q. Yes, sir, so why was it necessary for you to be there even
2 though you said that your--the assistant was out, why was it
3 necessary for someone, either you or the assistant to be working?

4 A. Because of the nature of our work doing policy and
5 legislative work, they aren't breaking a deadline when work comes in.
6 And, it is just necessary for somebody to be there to cover the
7 portfolio.

8 Q. And sir, you did notify your employer, your boss, that you
9 were involved in this case?

10 A. Yes.

11 Q. So, during those four days, from 27 to 30 December, what
12 were your work hours like during those days?

13 A. At least 9 to 5.

14 Q. Okay sir, so what about commuting to and from work, how--
15 roughly how long did it take you at that point?

16 A. About an hour door-to-door.

17 Q. Okay, so you usually left home at about 8 AM and got in at
18 work about 9; 9 to 5 and then left at 5, and got home usually----?

19 A. Strictly speaking, at least 9 to 5:30. So, I would usually
20 get home at the earliest, 6:30.

21 Q. Okay, sir, can you just briefly talk about reviewing
22 evidence in this case? You testified earlier that you had to review
23 the evidence at Fort McNair. Can you just describe the type--the

1 evidence and this case and the process you took to review that
2 evidence?

3 A. The evidence in this case was contained upon a classified
4 laptop, the reason for which is that the majority of--perhaps not the
5 majority, but a significant amount of documentary evidence was
6 classified. And, in order to review evidence, I basically would
7 review it on the laptop where the government set it up so that it was
8 organized by--essentially, by exhibit, by category so that you could
9 go through it and click. The documents you need to review would be
10 coming up. As I was working on the report, which was rather lengthy,
11 I would review the evidence and it was an iterative process where I
12 would be writing and reviewing as I was going through because I was
13 drafting a lot of footnotes in drafting that report for the items
14 that were on that laptop.

15 Q. And sir, based on your experience as a military judge, how
16 much evidence was involved in this case for your consideration?

17 A. The only cases that I have done as a military judge have
18 been very simple BCD cases, so I am not sure it is--how relevant that
19 is. I can say that the evidence in this case was extremely
20 voluminous.

21 MJ: Was extremely?

22 ATC1: Sir, can you please----

1 A. Voluminous, extremely voluminous. There were very many
2 documents on that laptop.

3 Q. Thank you, sir. So, when you reviewed this evidence,
4 generally how much time did you--did it take you on any given day to
5 review evidence?

6 A. During the day that I was reviewing evidence and working at
7 MDW at this case, I do not think there was any day when I was there
8 for less than 8 or 9 hours.

9 Q. And, why is that, why did it take you so long to review
10 evidence in this case on a given day?

11 A. Because there was a lot to go through.

12 Q. So, sir, during those four days from 27 to 30 December, you
13 said you were working at DOJ, do you ever review evidence before work
14 call at 0900?

15 A. No.

16 Q. Did you ever review evidence after leaving work?

17 A. No.

18 Q. And, why is that, sir?

19 A. Because that would have been the only place I could review
20 the evidence would have been at MDW.

21 Q. And, you said you had an hour commute to and from work,
22 sir?

23 A. Correct.

1 Q. Sir, can we just now just touch very briefly on the second
2 period of delay, the 7 to 8 January. Did you work on the report
3 during the time, sir?

4 A. No, I did not.

5 Q. And, why not?

6 A. The morning of that Sunday, my son had a swim meet in
7 Pennsylvania so I took him to the swim meet.

8 Q. Okay, sir, so in your experience, you said that you had
9 presided over six court-martials [sic], granted all of those of the
10 guilty pleas, but how would you describe the complexities of this
11 case?

12 A. Of this case?

13 Q. Yes, sir.

14 A. Very. It was a complicated investigation and a complicated
15 report. I would describe it as complex.

16 Q. And sir, are you still just vaguely familiar with the
17 charges facing the accused?

18 A. As I recall, yeah, I mean--I have general recollection of
19 the charges facing the accused.

20 Q. Yes, sir, and just generally of the elements of the
21 charges, sir?

22 A. Yes.

1 Q. Okay sir, just a hypothetical question, had the competent
2 authority--because we talked about classification, are you familiar
3 with classification review, sir?

4 A. As a result of this case, yes.

5 Q. Okay sir, so, had those classification reviews determined
6 that the evidence that the accused is charged with compromising was,
7 in fact, unclassified, would that have changed, at all, your report
8 in this case?

9 A. Had the classification reviews----

10 MJ: Hold on just a moment. Yes?

11 CDC[MR. COOMBS]: Your Honor, I have given the trial counsel
12 quite a bit of leeway. I do not see the relevance of this question,
13 though.

14 MJ: What is the relevance?

15 CDC[MR. COOMBS]: So, I would object to relevance.

16 ATC1: Your Honor, the relevance is that the defense alleges
17 that you could have, and in previous objections, the defense alleged
18 that someone, for instance, could come and testify about whether or
19 not the information was classified in lieu of having a classification
20 review. Or--so, we are just trying to get whether or not----

21 MJ: Well, how is that relevant to speedy trial?

22 ATC1: Fair enough, Your Honor. We will withdraw the question.

23 MJ: Major Fein?

1 ATC1: Your Honor, may I have a moment?

2 MJ: Yes.

3 [Pause]

4 CDC[MR. COOMBS]: And, Your Honor, with regards to the trial
5 counsel's answer there, if the question is whether or not he could
6 have considered a live witness as opposed to the actual
7 classification review, I could see that being relevant given the fact
8 that much of the delay was due to obtaining classification reviews.
9 And in fact, I would probably ask him that question myself. So, if
10 that were a question that the trial counsel was trying to ask----

11 MJ: Is this the right witness to be addressing those questions
12 to?

13 CDC[MR. COOMBS]: This is the----

14 MJ: Is this an expert witness on what level of proof is
15 required for these particular charges?

16 CDC[MR. COOMBS]: No, this would be the IO, just as far as
17 what he believes he would need in order to make an informed
18 determination and therefore make a recommendation to the Convening
19 Authority.

20 MJ: All right, I will allow. Overruled for now. Go ahead.
21 [Examination of the witness continued.]

22 Q. Okay, sir just to clarify, sir, if the classification
23 reviews or competent authority stated that the actual documents

1 compromised by the accused were not, in fact, classified, would that
2 have, at all, changed your decision--your recommendation, your
3 report, Article 32 report?

4 CDC[MR. COOMBS]: To that question, I would object, Your
5 Honor, because I do not think that is relevant. I think if he is
6 asking whether or not Colonel Almanza would consider a live witness
7 testifying about the classification of the information as opposed to
8 the classified review, I think that is relevant.

9 MJ: All right. I will overrule it for now, go ahead, let him
10 answer.

11 Q. Sir, do you want me to repeat the question, sir?

12 A. Yes, could you please repeat it?

13 Q. Yes, sir. Just hypothetically speaking, if the classified
14 review or a competent authority can testify that the information was
15 not classified, would that have changed your Article 32 report in
16 your opinion?

17 A. I believe so, because if I recall correctly, certain
18 specifications of the charges and specifications, classification--
19 proper classification was an element that was in there.

20 ATC1: Okay. Thank you, sir. I have no other questions, now
21 defense counsel may have some questions for you, Sir.

22

23

CROSS-EXAMINATION

Questions by the civilian defense counsel [MR. COOMBS]:

Q. Good afternoon, Colonel Almanza, how are you today?

A. Good, sir, how are you?

Q. Not too bad. I just have a few questions for you. I want to talk about the excludable delay e-mail that you sent. On 3 January 2012, Major Fein asked you to exclude, as reasonable delay, any time between 22 December and 3 January 2012 that you did not work on the Article 32 investigation based on either federal holidays or weekends, is that correct?

A. Yes.

Q. Now, prior to this e-mail from Major Fein, you never had any discussions with Major Fein about excludable delay, did you?

A. I did not.

Q. And, you never had any discussions with any other of the trial counsel or anyone from the government regarding excludable delay, is that correct?

A. Correct.

Q. And, prior to Major Fein's e-mail, you were not planning on drafting an excludable delay memorandum?

A. I was planning on doing a chronology, but, correct.

1 Q. Right, so you were planning on doing a chronology but you
2 were not planning on drafting an excludable delay memorandum under
3 R.C.M. 707(c), correct?

4 A. Correct.

5 Q. Now, after receiving Major Fein's e-mail, you wrote back
6 the very next day saying that you would, in fact, exclude the days
7 between 23 December 2011 and 3 January 2012 where you did not work on
8 the Article 32 investigation?

9 A. Correct.

10 Q. And prior to sending your e-mail to Major Fein, you did not
11 reach out to the defense in order to get our position on Major Fein's
12 request?

13 A. Correct.

14 Q. So, you did not, obviously, consider the defense's position
15 on whether or not that time should, in fact, be excluded?

16 A. Correct.

17 Q. And, in that e-mail that you responded back, you gave no
18 reasons or explanations for the delay other than these would be the
19 days that you were not working on the Article 32 investigation?

20 A. Correct.

21 Q. And, on 11 January 2012, you drafted a memorandum that
22 further documented the days in which you intended to exclude, is that
23 correct?

1 A. Correct, that is the chronology memorandum.

2 Q. All right, you break down these 10 days, 24 through 26

3 December 2011, and 31 through 2 January 2012 as being federal

4 holidays, those days that you were not working or weekends, correct?

5 A. Correct.

6 Q. And, this was the basis that you gave for excluding those

7 days, it was either a federal holiday or it was a weekend?

8 A. Correct.

9 MJ: What were those two dates again?

10 CDC[MR. COOMBS]: Yes, ma'am, 26 through--excuse me, 24

11 through 26 December 2011 and 31 December through 2 January.

12 MJ: Thank you.

13 Q. Now, you also excluded 7 and 8 January 2012?

14 A. Correct.

15 Q. And that was because that was a weekend?

16 A. Yes.

17 Q. And, you were taking your son to a swim meet?

18 A. Yes.

19 Q. Now, prior to this decision, of reducing it to a

20 memorandum, you had never--have excluded time under R.C.M. 707,

21 correct?

22 A. That is correct.

1 Q. And that applies to any other case that you have been
2 involved in, you have never excluded delay under R.C.M. 707?

3 A. Correct.

4 Q. And again, prior to your 11 January 2012 memorandum, you
5 did not seek the defense's input?

6 A. Also correct.

7 Q. Now, you are January 4 e-mail in your 11 January memorandum
8 say nothing about your military orders expiring, correct?

9 A. Correct.

10 Q. And the fact that your orders expired was not, in fact, one
11 of the bases for your excludable delay?

12 A. That is correct.

13 Q. Your 4 January e-mail and your 11 January e-mail also did
14 not reference anything about requiring--being required by your
15 civilian employer to come into work, correct?

16 A. That is also correct.

17 Q. Do you know why?

18 A. That was an oversight on my part from, you know, I should
19 have provided more of an explanation than that in those e-mails.

20 Q. Now, if I understand you correctly, your employer wanted
21 you to work between Tuesday, December 27th through Friday, December
22 30th?

23 A. Correct.

1 Q. And, your employer wanted you to come in because your
2 deputy was out of the office and no one was there to cover the
3 portfolio?

4 A. Correct.

5 Q. Now, if you wanted to, you obviously could have told your
6 employer, "Hey, I cannot come in because I am an IO in an Article 32
7 that is a very important case"?

8 A. Yes, I could have.

9 Q. And, in retrospect, you would agree that that is probably
10 what you should have done?

11 A. Yes.

12 Q. Now, if you said that you could not come in, then obviously
13 they would--you would have had those days to work on this case?

14 A. Yes.

15 Q. And, you did work on the case from 3 to 6 January and again
16 from 9 to 11 January 2012, is that correct?

17 A. Correct.

18 Q. And, by my calculation that is seven days?

19 A. Yes.

20 Q. And, had you worked between 23 December and 3 January,
21 which also is actually more than 7 days, then you could have
22 completed your investigation on 29 December, correct?

23 A. I believe so, yes.

1 Q. And obviously, the trial counsel asked you whether or not
2 you had completed your 32 investigation prior to its deadline and you
3 did, in fact, do that, right?

4 A. Yes.

5 Q. And, that headline was 16 November--excuse me, 16 January
6 2012, correct?

7 A. I believe so, yes.

8 Q. And you turned in your investigation on 11 January 2012?

9 A. Yes.

10 Q. So, obviously, you did not do the entire time to complete
11 your Article 32 report?

12 A. I did not need until the 16th, correct.

13 Q. So, again, had you worked between 23 December and 3
14 January, you would have completed the report on 29 December and would
15 not have needed any additional time?

16 A. Correct.

17 Q. Now, during the Article 32 hearing, you ruled that certain
18 information was not relevant to either the form of the charges, the
19 truth of the charges or information that you will would need in order
20 to make an informed decision as to a recommendation as to
21 disposition, correct?

22 A. Yes.

1 Q. Now, I want to ask you a couple of questions about what you
2 consider as the Article 32 IO. During the Article 32 investigation,
3 you considered the classification reviews?

4 A. Correct.

5 Q. And you considered those reviews in order to determine
6 whether or not information charged was properly classified?

7 A. Correct.

8 Q. Now, the government, if they wanted to, could have called
9 the witness in order to testify that the information charged was
10 properly classified, correct?

11 A. I would assume so.

12 Q. Now, if the government did----

13 MJ: I did not get that response.

14 CDC[MR. COOMBS]: He said, "I would assume so."

15 A. Correct. Sorry, ma'am.

16 Q. And, if the government did not have the original
17 classification review reports and, in fact, called a witness in order
18 to testify at the Article 32, you would have considered the testimony
19 in making an informed opinion as to the disposition of the charges?

20 A. Yes, because if--the evidence I was given on classification
21 of documents was through witness testimony rather than through a
22 document I would have considered that.

1 Q. Now, during the Article 32, did you consider any
2 unclassified forensic reports?

3 A. Yes, if I recall correctly, the unclassified--at least the
4 forensic report concerning the computer and the supply annex was
5 unclassified.

6 Q. All right. And, you also considered classified forensic
7 reports?

8 A. Correct.

9 Q. And, based upon our discussion, these forensic reports
10 assisted you in compiling your Article 32 report?

11 A. Yes.

12 Q. Now, obviously if you did not have these forensic reports,
13 and instead had agents from CCIU come testify as to their forensic
14 work, that would have made it a little more difficult for you?

15 A. Yes.

16 Q. But, you would have considered the testimony if you did not
17 have the forensic reports?

18 A. Yes, it would have been--it would have given the details I
19 put in a report and the number of references to this forensic reports
20 and how important I found them, it would have been much more
21 difficult to write the report without having the forensic reports.

22 Q. And obviously as the Article 32 IO, you would not have
23 said, "I do not want to go forward without the forensic reports or

1 without the classification reviews", if you were given live witnesses
2 who testify to that information?

3 A. Yes, that is correct, I would have gone forward on the
4 evidence at the time.

5 Q. Now, the government asked you about the fact that you were
6 at one point read on as the IO?

7 A. Yes.

8 Q. And, do you recall when the date was?

9 A. That was in January, I believe, but it was January or
10 February, but it was like January 2000--it was a long time ago, I do
11 not want to misstate the year. It was--it was in January of 2010.

12 Q. Okay, well why don't we do it this way, the IO
13 investigation ended, you turned in your report in January of 2012,
14 correct?

15 A. Correct.

16 Q. So it was, maybe, January 2011. It was a long time before
17 the hearing.

18 Q. All right, so, it would have been in January prior to the
19 hearing, at least in this case, probably January of 2011?

20 A. I believe so.

21 Q. And, when were you identified or appointed by the Convening
22 Authority to be the IO?

23 A. I believe it was the preceding August.

1 Q. So, between August of 2010 to January 2011, that is about
2 the timeframe you believe it took in order for you to be read on?

3 A. I do not know what the cause of the--I do not know what the
4 cause of that was, I do recall that I was appointed in August and it
5 was the following January, I believe, that I got read on.

6 Q. And, do you know when the government first started
7 coordinating with you in order to do the necessary paperwork in order
8 to get you your TS SCI clearance?

9 A. I already had a TS SCI clearance. It was purely a matter
10 of getting read on very quick.

11 Q. When did the government first coordinate with you in order
12 to get you read on?

13 A. Shortly before the actual time that I went down to get read
14 on, within a matter of weeks, so it would have been some time that
15 January, I believe.

16 Q. So, between August 2010, when you were appointed as the IO,
17 in January 2011 when--or shortly before, when you were contacted in
18 order for you to be read on, nothing was done in order to get you
19 read on?

20 A. Correct.

21 Q. Thank you, Lieutenant Colonel Almanza. The government may
22 have some redirect?

23 A. Thank you.

REDIRECT EXAMINATION

Questions by the assistant trial counsel [CPT WHYTE]:

Q. Colonel Almanza?

A. Yes.

Q. It is Captain Whyte again, I just had a very short number of questions ask you. The defense cited Major Fein's e-mail to you?

A. Yes.

Q. Asking you to exclude any period of time that you did not work on the Article 32 report?

A. Correct.

Q. Were all defense counsel on that e-mail?

A. I believe so.

Q. Did the defense ever object to the prosecution's request for, or the United States' request for you to exclude that time?

A. I did not believe so.

Q. Do you remember if the defense corresponded with you after Major Fein sent you that request?

A. I do not recall any such e-mail.

TC[MAJ FEIN]: Okay. We have no further questions for you, sir.

MJ: Any follow-up, Mr. Coombs?

CDC[MR. COOMBS]: Just to follow up on that.

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Q. Lieutenant Colonel Almanza, after you received the e-mail for Major Fein, you responded back--you receive that e-mail on the 3rd and responded back on the morning of the 4th, correct?

A. That is correct.

Q. And in that e-mail, you indicated that you would in fact excuse any days that he did not work on the Article 32 investigation?

A. Correct.

Q. And, in that e-mail, you indicated that you would, in fact, delete--or excuse me, exclude any days that you did not work on the Article 32 investigation.

A. Correct.

Q. And, in that email you indicated a range that you would not--you would exclude, but at that point, you had not identified the exact days, correct?

A. I believe so, I do not have perfect recall of the e-mails, but yes, that sounds correct.

CDC[MR. COOMBS]: All right, thank you.

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1 EXAMINATION BY THE COURT-MARTIAL

2 Questions by the military judge:

3 Q. Lieutenant Colonel Almanza, I have a couple of questions
4 for you.

5 A. Yes, ma'am.

6 Q. What were the days--this is Colonel Lind--what were the
7 days of the actual hearing?

8 A. The days of the actual hearing would be in the chronology
9 memo, ma'am. But, it would be--I believe we started on a Saturday,
10 was it the 15th? And we concluded on Thursday the 22nd.

11 Q. Was there any kind of plan if the hearing was going to go
12 beyond the 22d of December that you had worked out with the parties?

13 A. Early on, ma'am, we had discussed that as a potential, but
14 once I made determinations as to the number of witnesses that I
15 needed to call in order to be able to prepare to thorough report. I
16 think it was fairly clear that we would be able to get the hearing
17 done by the 22nd.

18 MJ:: All right, any follow-up based on that?

19 TC[MAJ FEIN]: No, Your Honor.

20 CDC[MR. COOMBS]: No, Your Honor.

21 MJ: All right, anything else for Lieutenant Colonel Almanza?

22 TC[MAJ FEIN]: No, ma'am.

23 CDC[MR. COOMBS]: No, ma'am.

1 [The witness was duly warned, permanently excused, and the telephone
2 connection was terminated.]

3 TC[MAJ FEIN]: Ma'am, at this point, the United States
4 recommends we go on a lunch break and then call Mr. Haggett
5 afterwards.

6 MJ: All right. How long would you like?

7 CDC[MR.COOMBS]: Your Honor, if we could have 1430?

8 MJ: Does that work for both sides?

9 TC[MAJ FEIN]: It does, Your Honor.

10 MJ: Okay. Court is in recess until 1430.

11 [The Article 39(a) session recessed at 1312, 7 November 2012.]

12 [The Article 39(a) session was called to order at 1437, 7 November
13 2012.]

14 MJ: This Article 39(a) session is called to order. Let the
15 record reflect all parties present when the court last recessed are
16 again present in court. Is there anything else we need to address
17 before we called witness?

18 TC[MAJ FEIN]: No, Your Honor.

19 CDC[MR.COOMBS]: No, Your Honor.

20 MJ: Please called witness.

21 TC[MAJ FEIN]: Your Honor, the United States calls Mr. Bert
22 Haggett.

1 BERT HAGGETT, civilian, was called as a witness for the prosecution,
2 was sworn, and testified as follows:

3 DIRECT EXAMINATION

4 Questions by the trial counsel [MAJ FEIN]:

5 Q. And, you are Mr. Bert Haggett, of the Headquarters,
6 Department of the Army, G2?

7 A. Yes.

8 Q. Mr. Haggett, before we begin, during questioning today, if
9 you feel a question asked by the government counsel, the defense
10 counsel or the court requires a classified answer, before answering,
11 please inform the Court?

12 A. I will.

13 Q. Mr. Haggard, what is your current duty position?

14 A. I am responsible for information security policy for the
15 Army and for litigation support.

16 Q. And when did you first join the Army as a Department of the
17 Army civilian?

18 A. 1980.

19 Q. And, when did you join the Army G2 office in your current
20 capacity?

21 A. 1980.

1 Q. And, in that current capacity as Chief of Information
2 Security Policy, what are your, essentially, primary
3 responsibilities?

4 A. I am responsible for information security throughout the
5 Army.

6 Q. And then you mentioned before, provide litigation support?

7 A. Correct.

8 Q. What you mean?

9 A. Support, when called upon, to provide a function in support
10 of legal counsel.

11 Q. And, to provide support for both criminal and civil
12 litigation?

13 A. Yes.

14 Q. And, could you give an example of the criminal litigation?

15 A. An example of the criminal side would be if the Army was
16 contacted by a federal law enforcement entity, their request that
17 classified information be reviewed to make sure it is currently
18 classified.

19 Q. And what about the civil side?

20 A. Civil side would likely be FOIA litigation.

21 Q. And sir, you mentioned your--another primary responsibility
22 is to oversee information security for the Army. What regulations is
23 the Army G2 is the proponent of?

1 A. For information security, it is Army Regulation 380-5.

2 Q. And, what is your role or experience with that regulation?

3 A. My role is that I am responsible for that regulation.

4 Q. And are you an advisor for the regulation?

5 A. To the G2, yes.

6 Q. Sir, in that role as an adviser to the Army G2, the Deputy

7 Chief of Staff for Intelligence, I would like to ask you a few

8 general questions about that role, but first, what is classified

9 information?

10 A. Classified information is information that has been

11 designated as classified under the sections of Executive Order 12935,

12 and I may have the number backwards. The current Executive Order

13 issued by President Obama that is the requirements for protecting

14 information assets of security information.

15 Q. And, is that current Executive Order, Executive Order

16 13526?

17 A. Correct.

18 Q. And, what types of information requires protection for

19 purposes of national security?

20 A. The order allows classification of military operations and

21 plans, intelligence sources and methods, weapon--information dealing

22 with weapons of mass instruction, foreign affairs.

1 Q. And, is Executive Order 13526 somehow promulgated within
2 Department of the Army regulations?

3 A. Within AR 380-5, yes.

4 Q. And, what are the different levels of classification left
5 down from the Executive Order and into Army regulations?

6 A. Three levels are Confidential, Secret and Top Secret.

7 Q. And, who under the Executive Order and regulation make
8 decisions on whether something is or is not classified?

9 A. An Original Classification Authority.

10 Q. What is a typical position or rank of an original
11 classification authority?

12 A. Within the Army, a typical rank or position would be Major
13 General.

14 Q. Does every two star general or equivalent SES have OCA
15 authority?

16 A. No, it is designated by position, following need.

17 Q. And, what is the highest level position of an OCA in the
18 Department of the Army?

19 A. The Secretary of the Army.

20 Q. And so, Mr. Haggett, can a single document have more than
21 one OCA?

22 A. Yes.

23 Q. can one paragraph within a document have more than one OCA?

1 A. They can, yes.

2 Q. Thank you for the background information. I would like you
3 now to explain--well let me ask you few questions. On a daily basis,
4 how does an individual who is a holder of classified information or
5 deals with classified information, how do they know whether something
6 is classified?

7 A. Classified information is required to be marked as such.

8 Q. And how is it typically, for a document, like for instance,
9 required to be marked?

10 A. It would be marked top and bottom, the level of
11 classification, it should also be portion marked in paragraphs.

12 Q. And, if the holder or user of classified information, are
13 they required to assume it is classified?

14 A. If it is so marked, yes.

15 Q. And why is that?

16 A. That is the basic requirement of handling classified data
17 that you protected as such.

18 Q. How does the creator of a document, one who, like as an
19 attorney, I am writing a document, typing a document. How does a
20 creator know whether the information that they are reading is
21 classified?

22 A. If you are writing a memo in response to an inquiry, that
23 the original document may be marked as classified. If you are

1 responding to it, and using some of the original information, you
2 would bring forward that classification.

3 Q. Is there another method to know, another method to know
4 whether some information you want to use is classified?

5 A. If you are developing a new document, you could also use a
6 classification guide.

7 Q. Okay, so sir, could we first talk about, you talked by
8 bringing the classification forward, is there a name for that type
9 of----

10 A. Derivative classification.

11 Q. And, could you explain what derivative classification is?

12 A. Essentially, your new memo carries classification that was
13 derived from another source in the original document.

14 Q. And how would you know by looking at a document whether it
15 has been derivatively classified?

16 A. It is required to be marked as such.

17 Q. And, what are some examples, and again generic examples, of
18 classified sources, source documents where one would pull information
19 from?

20 A. It could be a memo, it could be a slide deck, almost any
21 form of communication.

22 Q. Okay.

23 A. An e-mail.

1 Q. And sir, earlier you mentioned that there is--there are two
2 reasons, one is a derivative classified or from a source document or
3 where someone would get classified information from. The other was a
4 security classification guide. Could you please explain what is a
5 security classification guide.

6 A. A security classification guide essentially is a
7 instruction that was put together by an original classification
8 authority that is meant to serve as an instruction if someone is
9 using the data that is then classified by that OCA.

10 Q. Thank you, sir. What I would like you to do is, let's
11 establish an example for purposes of your testimony, again just to be
12 generic, please assume that this blue ink pen that I am that I am
13 currently holding is classified. This blue ink pen. It is, how
14 would I, and so again, for practical example, how would I, as one who
15 knows about this blue ink pen, with proper clearance and everything,
16 how would I go about writing about it, making sure it is properly
17 marked?

18 A. If the pen itself contains classified data, that would be a
19 decision of the Original Classification Authority. The Original
20 Classification Authority is required to put out instructions as to
21 what about that pen may be classified. It could be that the
22 composition of the ink would be secret. The overall length of the
23 pen would not be, wouldn't be classified. How long the ink would

1 last in the pen, it could be unclassified or secret as well. It is
2 meant to be an instruction that we use.

3 Q. And--well, thank you. You just spoke about original
4 classification authority and an original classification authority
5 making decisions. Could you explain to the court please how
6 information is originally classified under Executive Order 13526?

7 A. To be originally classified, that is a decision that needs
8 to be made by an individual who has been delegated original
9 classification authority and any such designation must follow the
10 rules laid out in the Executive Order.

11 Q. And what are those rules?

12 A. Basic rule is that the government has propriety of the
13 data. There also needs to be a designation as to what level of
14 classification will be applied, Confidential, Secret and Top Secret.
15 It must fit into a category that allows for classification within the
16 order. Again, military plans and operations data, intelligence data,
17 weapons of mass instruction data. And, there must also be a sunset
18 for the classification; it becomes declassified in 10 years, or 15
19 years, or 20 years.

20 Q. And sir, your very first factor was that, I think you said
21 the United States would have to have propriety in the information,
22 what do you mean by that?

1 A. Correct. Control; in order to classify data we must ensure
2 that the data is within our control. So, we would need essentially
3 the requirements of trying to make sure that there is no release of
4 the data. If we do not control it, there is no real need to classify
5 it.

6 Q. Now, all of these factors that go into original
7 classification is simply that a typical user or recipient of
8 classified information is receiving or privy to?

9 A. Not necessarily. Generally, that is a determination made
10 by an Original Classification Authority.

11 Q. And, how is that then determination, I guess, promulgated?

12 A. It is communicated within a classification guide.

13 Q. Is it also communicated on the document itself?

14 A. Yes. The document must be marked.

15 Q. Sir, I would like to now focus your attention on what we
16 have heard much about already in this motions hearing, not of course
17 with you testifying, that is the classification review process.
18 Assuming information is classified, what, at least initially, is a
19 process called to determine whether the information is properly
20 classified?

21 A. A classification review.

22 Q. And, in general, what is a classification review?

1 A. In general terms, a classification review is a review is
2 the appropriate Original Classification Authority to determine
3 whether or not that information is classified.

4 Q. And sir, who is appointed for determination whether it is,
5 or is not, properly classified?

6 A. The OCA.

7 Q. And what authority gives that OCA that power, that
8 authority?

9 A. Authority is driven [sic] derived from the Executive Order.

10 Q. Now, does an OCA themselves to go into the entire
11 classification review process?

12 A. Unlikely, they will probably have certain designated staff
13 used to it.

14 Q. So, that processes typically a process?

15 A. Yes.

16 Q. Who else assist OCA's with, for instance, what staff
17 members would assist the OCA in executing?

18 A. It could be a member of the security staff. It could be a
19 subject matter expert dealing with technical data or a combination of
20 both. And, counsel may also review it.

21 Q. Can any of those subject matter experts, specifically a
22 security expert like yourself, make the final classification
23 decisions?

1 A. No.

2 Q. Sir, do you have personal experiences with classification
3 review processes?

4 A. I do.

5 Q. In your experience, when is a classification review,
6 typically, initiated or started?

7 A. In my experiences, at the request of counsel.

8 Q. So this isn't a--so classification review processes aren't
9 routine, everyday business within the Army or government?

10 A. No.

11 Q. And you said "counsel," could you explain why an attorney
12 would be making a request?

13 A. My experience is that, generally, such requests are
14 required when classified information is the focus of a legal
15 proceeding.

16 Q. Okay. Does that go back to the criminal or civil
17 litigation?

18 A. Yes.

19 Q. Now, at the end of the classification review process, what
20 are the different types of either end-products or deliverables that
21 occur?

22 A. The usual deliverable is a written justification,
23 essentially, from the original classification authority.

1 Q. Can there be other deliverables?

2 A. Certainly; it could be an email, something less formal.

3 Q. What about just testimony?

4 A. Could be.

5 Q. Now, go back to our example from before, Mr. Haggett,
6 about, again, this blue ink-pen in my hand, assuming it's classified,
7 I'd like you to explain to the court an example of how classification
8 review process would occur.

9 So, to start off with--you said, typically, counsel or law
10 enforcement come to you and identify information that might be
11 classified, what's the first step in that process?

12 A. My first step, likely, using your scenario, would be to
13 refer the document in question to the organization that's responsible
14 for that pen.

15 Q. How do you figure that out?

16 A. In many cases, it could be something as simple as
17 letterhead. It could be ascertaining what command may have issued it
18 in the first place. Whether it was something that belonged to COCOM,
19 is an example.

20 Q. I'm sorry, could you repeat that last part?

21 A. Whether it belonged to a specific command or COCOM or
22 agency.

1 Q. And can just anyone new to this type of job conduct this
2 initial review?

3 A. Not the initial review, no.

4 Q. Does it take some type of qualification?

5 A. I have found that it takes experience and knowing what to
6 look for.

7 Q. So, sir, after--so the first step you said is that, if you
8 were received on behalf of the Depart of the Army or someone in your
9 position, first it's to look at the document and figure out what
10 equity holders are involved?

11 A. Correct.

12 Q. Then what?

13 A. I would refer it, formally, to that equity holder along
14 with a request that a classification review be undertaken.

15 Q. Right, so you just used a new term that we haven't heard
16 yet in your testimony, "refer." Will you please explain what
17 referral is?

18 A. In this case, essentially, it is taking that action and
19 formally transferring it to the most interested party; in this case,
20 the organization that is responsible for the overall pen.

21 Q. Okay. First--why is--is "refer" a formal process or
22 informal process?

23 A. Generally, it's formal.

1 Q. And is it required?

2 A. Yes.

3 Q. What requires a referral?

4 A. The executive order requires it.

5 Q. And what does it specifically require?

6 A. Essentially, what it requires is a review all of classified
7 information by the same original classification authority that
8 classified it.

9 Q. So, going back to your example where, at the very beginning
10 you say, "A document can have multiple original classification
11 authorities----

12 A. Correct.

13 Q. --and a paragraph within a document could have multiple?

14 A. Correct.

15 Q. So, you're--step one, you're reviewing the document to
16 determine equity holders?

17 A. Uh-huh.

18 Q. So then what--this next step of referral, what, literally
19 would happen? So, in this example, the blue ink pen or a document,
20 what physically occurs next?

21 A. Well, what physically occurs next is that original
22 classification authority's organization would review the information
23 in question and they would work to identify what information in that

1 document, or within the pen, belonged to them and then they actually
2 execute the review.

3 Q. Okay. And if they identified information that did not
4 belong to them but they suspected was classified, what occurs?

5 A. If they identify classified information within that
6 document, or pen, that does not belong to them that they have good
7 reason belongs to yet another organization, they're responsible for a
8 subsequent referral of that information to that secondary
9 organization for review.

10 Q. So it--so, then, for a classified document that has many
11 sources of classified information, it would seem that the document
12 could--or would have to be passed forward until all the original
13 classification authorities have reviewed it. Is that accurate?

14 A. Correct.

15 Q. What is the normal average length of time to complete a
16 classification review of information?

17 A. Difficult to say. I'm not sure that I could say if there's
18 a typical.

19 Q. Well, are there factors that could exist that would affect
20 the length of time?

21 A. The complexity of the information in question, the number
22 of original classification authorities involved, the availability of
23 staff to review the information.

1 Q. What you mentioned before about the referral process, is
2 that a factor in the length of time?

3 A. It can be, certainly. If you have a secondary referral, by
4 and large, that referral comes back to you at that point in time and
5 you have to, essentially, reassemble it.

6 Q. And I'm sorry, you said, "reassemble," you didn't really
7 talk about a deconstruction, so could you explain, kind of in
8 reverse, what you're talking about?

9 A. If you have a document with multiple classified equities
10 and those equities are classified by multiple OCAs, at that point in
11 time, you essentially need identify back--when you report all
12 findings out, you would list that first organization, Organization A,
13 is dealing with information in paragraph one, Organization B is
14 dealing with information in paragraph two, and so forth

15 Q. Okay. Mr. Haggett, how frequent are classification reviews
16 conducted within the Department of the Army?

17 A. Fairly rarely.

18 Q. What about within the Department of Defense?

19 A. I think rarely.

20 Q. And do Army commands or head---

21 DC: Sorry, Major Fein, I couldn't understand his answer. Is
22 Mr. Haggett saying "rarely" or "regularly"?

23 WIT: Rarely. My apologies.

1 Q. And also--and do regular--do Army commands or Headquarters,
2 DA, Army agencies, DOD, do they have dedicated personnel or offices
3 to conduct classification reviews?

4 A. That's not been my experience, no.

5 Q. So, there's no dedicated individuals within these
6 organizations to do this? Where do the----

7 A. Not the--that's not been my experience, no.

8 Q. Where do the individuals who have to get tasked with this
9 job come from?

10 A. They're going to come from existing staff.

11 Q. Okay. And to determine whether information is or is not
12 classified, is a classification review required?

13 A. Yes, and that--if we were asked to do a review like that in
14 support of a legal proceeding, yes.

15 Q. And why is it required?

16 A. It would be required, essentially, if we are being asked if
17 information is currently improperly classified. In order to get to
18 that point, a classification review is necessary.

19 Q. Is the process necessary if an OCA would testify about
20 whether information is classified?

21 A. The process would need to be there no matter how it's
22 reported out.

1 Q. So sir, in your experience, have you had documents that
2 appear classified and were properly handled as classified, but after
3 classification review, they were determined to be unclassified?

4 A. Yes, frequently.

5 Q. And does anyone other than an OCA have any authority to say
6 something is or is not classified?

7 A. No.

8 Q. Is this process that's followed under the executive order
9 the same at other government organizations within the executive
10 branch?

11 A. It is.

12 Q. Why?

13 A. Because the executive order applies across the federal
14 government, across the executive branch, by direction of the
15 president.

16 Q. Okay, Mr. Haggett, at this point I'd like you to focus now
17 on the actual classified information involved in this case. Are you
18 familiar with this case?

19 A. Yes.

20 Q. How are you familiar with this case?

21 A. I'm familiar with it because I was asked to provide advice
22 on routing documents to the proper original classification authority.

1 Q. And before we get into too many specifics, what are the
2 different types of classified information that make up the charged or
3 compromised documents? Again, types, not very--not specifics.

4 A. It could be intelligence information, military plans and
5 operations, generally.

6 Q. And in what form are they in, is it---

7 A. Documents, slide decks, various forms of communication.

8 Q. And sir, what are the different types of classified
9 information that make up the law enforcement or other investigations
10 that are involved in this case?

11 A. Within the law enforcement documents, I believe that there
12 were occasions where intelligence information was within them.

13 Q. And from the information that you were exposed to and that
14 you assisted with, is this case, for classification review processing
15 purposes, more complicated than the typical case that you've
16 experienced?

17 A. It has been, yes.

18 Q. And why?

19 A. By and large because of the volume of information that
20 needed to be dealt with. And it also--some of the information was
21 multi-paged, multi-subject, multi-original classification authority.
22 That clearly takes extra time as opposed to a one-page document.

1 Q. So--I know this might seem obvious, but why does increased
2 volume make it different?

3 A. Primarily because the staff that's available to do initial
4 reviews is a finite number. OCAs will establish their own process
5 for how they want to have the information reviewed. As before, it
6 could be security staff or technical staff, combination of both, but
7 if you're dealing with individuals who specialize in security or some
8 technical area, there are only so many of those people that you can
9 call upon to do those reviews.

10 Q. And so, sir, when asked what makes this case different than
11 the others, you mentioned volume; you're talking about the substance
12 like a slide deck? What about referrals? Is that--was that a factor
13 in this case?

14 A. It would have been because of the different organizations
15 that were going to have--would actually do the review and it's just
16 exponential.

17 Q. And sir, you looked at many of the classified documents----

18 A. I did.

19 Q. --that are charged in this case? Did they require
20 referrals?

21 A. Yes.

22 Q. Did they require referrals both--or within the Department
23 of the Army?

1 A. Yes.

2 Q. Did they require referrals outside the Department of the
3 Army----

4 A. Some did.

5 Q. --but within the DOD?

6 A. Some did, yeah.

7 Q. And what about outside the Department of Defense?

8 A. Correct.

9 Q. Now, sir, do these differences, these differences that
10 you've identified, does that somehow necessitate more time?

11 A. I believe it's going to--it would take more time simply
12 because there is more work to do, more pages.

13 Q. Okay, sir. What I'd like to now focus you on is a very
14 specific portion of this case. It's the original--what was
15 originally called the "Unclassified CID Case File" and your
16 involvement. Are you familiar with the documents that were
17 originally designated as the unclassified case file?

18 A. Yes.

19 Q. And what were examples of those types of documents that
20 you're familiar with?

21 A. Sworn statements, exhibits, other investigatory material.

22 Q. Okay. And what was your involvement in the review of those
23 files?

1 A. I was asked to screen them to render an opinion as to
2 whether they were accurately described as unclassified.

3 Q. And do you remember, approximately, how many pages or how
4 many files you reviewed?

5 A. I don't.

6 Q. Sir, was it more than 500?

7 A. I believe it was, yes.

8 Q. More than 900?

9 A. I believe it was right at 900.

10 Q. And why was it necessary for you to review these more than
11 900 documents?

12 A. Essentially, I was asked to do that to ensure that the
13 documents did not contain classified information so they could be
14 used in an unclassified manner.

15 Q. But they were originally--at least CID kept them
16 unclassified. Why would you, then, need to look at it at that point?

17 A. As a double-check, I believe.

18 Q. Did you identify any information or any equity holders'
19 classified information in the CID file?

20 A. I did.

21 Q. And what occurred after that identification?

22 A. I believe they were subsequently referred to the
23 organizations that I suggested.

1 Q. And who did you suggest that to?

2 A. (Unintelligible) counsel.

3 Q. Sir, going back to your--well, it's been your on-going
4 testimony but--litigation support, do you have any familiarity with
5 CIPA proceedings, or, as we call it in the Military Rule of Evidence
6 505 proceedings?

7 A. I do.

8 Q. Why are you familiar with that?

9 A. On several occasions, I've had to employ methods required
10 by CIPA.

11 Q. Specifically, are you familiar with substitutes or
12 alternatives under CIPA or M.R.E. 505?

13 A. Yes.

14 Q. And what are substitutes or alternatives to classified
15 information?

16 A. The substitutes would be entered into the document in place
17 of classified information.

18 Q. And what are the steps that an organization must go through
19 in order to produce a substitute or alternative? In general?

20 A. In general, the first requirement would be to determine
21 what needed to be substituted for, i.e. what's classified. You
22 needed to do a classification review, identify the information that

1 is sensitive, and, at that point, determine a reasonable unclassified
2 substitution.

3 Q. So can a substitute or alternative, in your experience,
4 under CIPA, be produced without a classification review?

5 A. No.

6 Q. And why not?

7 A. The whole point is to come up with an unclassified
8 substitution. In order to do that, you need to identify what the
9 classified information is that needs to be substituted for.

10 Q. So, is it conceivable, from, again, your experience, that
11 producing a substitute alternative would speed up a classification
12 review?

13 A. Unlikely; it would be an additional step.

14 Q. Mr. Haggett, finally, what Department of Army regulation
15 outlines the granting of a security clearance and access?

16 A. Security clearances would be AR 380-67.

17 Q. And what is AR 380-67?

18 A. It promulgates policy on the granting of security
19 clearances.

20 Q. Mr. Haggett, are you familiar if there is a specific
21 portion for attorneys representing service members?

22 A. There is, yes.

23 Q. And what does that portion say?

1 A. It outlines the requirements for obtaining a security
2 clearance for defense counsel.

3 Q. Does that include access--general access as well?

4 A. No.

5 Q. And who is the authority to grant this clearance for
6 defense attorneys?

7 A. The appropriate original classification authority.

8 Q. I'm sorry, but under--let me back up. We're talking under
9 380-67, just within the Army, who is the approving official?

10 A. The G2, to approve the security clearance.

11 Q. I'm sorry, which G2?

12 A. The Army G2.

13 Q. The G2?

14 A. Yes.

15 Q. Okay. Does that--so, once the Army G2 grants the security
16 clearance access to defense counsel under the regulation, does that
17 mean that the defense counsel can have access to any classified
18 information?

19 A. No.

20 Q. What is required for them to have access to specific
21 classified information?

22 A. Approval of the appropriate original classification
23 authority?

1 Q. And would that entail--or would that apply to documents,
2 evidence, and anything else that is classified?

3 A. Anything that would be classified, yes.

4 TC[MAJ FEIN]: Okay, sir. Well, thank you very much. I assume
5 defense will have some questions.

6 **CROSS-EXAMINATION**

7 **Examination by the civilian defense counsel:**

8 Q. Good afternoon, Mr. Haggett.

9 A. How are you?

10 Q. I'm good, thanks. How are you?

11 A. Doing well.

12 Q. Good. I want to talk to you about the referral process.

13 A. Sure.

14 Q. And in particular with this case. So, in this case,
15 counsel, that is to say members of the prosecution team, would give
16 you documents?

17 A. Correct.

18 Q. You would review them?

19 A. Uh-huh.

20 Q. And then you would refer them to an original classification
21 authority?

22 A. I then would identify them, yes, as to where the process
23 needed to begin.

1 Q. And you would sign the referral yourself or someone else
2 inside the G2?

3 A. I--to be honest with you, I don't recall.

4 Q. How does that--how is it normally handled?

5 A. Normally, it's done as a routine staffing action; it would
6 be signed out by the G2.

7 Q. And this referral, did it contain a suspense or a deadline?
8 These referrals in this case?

9 A. I don't recall. I don't believe so.

10 Q. And you didn't--or a suspense wasn't included in the
11 referral because of the complexity of the case?

12 A. I think it was more of an issue, if I recall correctly,
13 that the case was of obvious importance and, at the same time, when I
14 was in contact with some of the security officials, counsel was also
15 in touch with the legal staff offices for the effected organizations.
16 It was making them aware of the sensitivity and the focus of the
17 case.

18 Q. So there would be different lines of communication running?

19 A. Sir?

20 Q. You would be talking to equity holders, security personnel?

21 A. Uh-huh, generally.

22 Q. And the counsel--prosecution in this case, would be talking
23 to the equity holders' counsel--legal counsel that are assigned---

1 A. As I recall, they did.

2 Q. And in the referral, are there any specific instructions
3 given as to what is to be done?

4 A. Yeah--essentially, yes, that--the requirement was for a
5 classification review of the information.

6 Q. But a deadline was not established for this information?

7 A. Not that I recall, no.

8 Q. Generally speaking, deadlines are included in these
9 referrals?

10 A. My experience, no. It's something that's communicated
11 directly to the receiving command and there is clearly an
12 understanding that if something is in the legal process, it must be
13 done as quickly as possible.

14 Q. There's nothing to prohibit a referral including a deadline
15 note?

16 A. No.

17 Q. And is this urgency communicated in the referral because
18 it's a legal case involving an individual being tried, is that
19 alluded to in the referral?

20 A. It was in my communications.

21 Q. Now, with respect to the original classification
22 authorities, they must conduct this review out of hide?

23 A. Yes.

1 Q. With personnel that are already assigned there?

2 A. Correct.

3 Q. And those personnel are going to be security personnel?

4 A. Could be.

5 Q. Legal personnel?

6 A. Could be.

7 Q. Intelligence personnel?

8 A. All very possible.

9 Q. And they have as long as they want to respond to your

10 request?

11 A. Were they given a hard deadline? Not that I recall, but

12 there was a--I don't remember any ambiguity as to the need to do this

13 properly, as efficiently as possible.

14 Q. Would a classification review normally take around 4

15 months?

16 A. If it was a single, reasonably uncomplicated document,

17 that's probably possible, yes.

18 Q. In the single--in the pen--in Major Fein's pen, would it be

19 unreasonable for it to take 8 months?

20 A. Depending on the complicating factors, not necessarily, no.

21 Q. It would not be reasonable?

22 A. It would not be unreasonable; it's happened.

23 Q. Would it be reasonable to take a year?

1 A. In that type of an example, I think that would probably be
2 a little too long.

3 Q. So, a year, that'--informally, in your mind anyway, that's
4 probably too long?

5 A. For a single referral, perhaps, yes.

6 Q. What about referral in a case in which there's much more
7 complicated information? Is a year too long?

8 A. Depending upon the information--hard to determine. If it's
9 exceptionally complicated and it's being handled by people who don't
10 work the issue very frequently, it may not be.

11 Q. Would 2 years--under those circumstances, would 2 years be
12 too long?

13 A. Perhaps; again, for a single referral.

14 Q. But in cases of multiple referrals, 2 years would even be
15 an inappropriate amount of time to do a classification review?

16 A. If you're talking about one document that may need to be
17 referred to a--let's say two or possibly three classification
18 authorities, that should be, I would think--be done within that
19 length of time.

20 Q. Now, when you were doing these referrals, they're to
21 summarize to agencies within the Department of the Army?

22 A. Uh-huh.

23 Q. Agencies within the Department of Defense?

1 A. Uh-huh.

2 Q. And then other federal agencies?

3 A. Correct.

4 Q. So, those federal agencies, be they Department of Defense
5 assets or not, they could be given instructions as to when this
6 should be done?

7 A. As to whether or not they could be, I suppose they could.

8 Q. Right.

9 A. But then again, my function in that type of role and, by
10 and large, the security function is to simply get the review
11 accomplished.

12 Q. But the Department of the Army generally is in the business
13 of giving orders and having them fulfilled?

14 A. In general terms, certainly.

15 Q. And if more personnel were needed to accomplish a deadline,
16 they could be given more personnel from inside the Department of the
17 Army or wherever?

18 A. Conceptually, yes, but simply giving extra sets of hands
19 may not, in and of itself, expedite that process. You'd have to have
20 extra hands that are familiar with the information.

21 Q. And those people are available?

22 A. My experience is not always, no.

23 Q. So that's what makes 2 years a reasonable amount of time?

1 A. I'm uncomfortable using the term "reasonable" because it
2 has so many variables in it. The key issue, for me, when I refer
3 these things is that the process be carried out just exactly as
4 required under the auspices of the order and that there be no doubt,
5 in the end, as to--it's either classified or unclassified; one way or
6 the other. Sometimes that takes time. Sometimes, I guess, it could
7 take--it can be maddeningly long, but the point of it is that it is
8 very exacting and it requires a very specific process to take you,
9 there, to the end game.

10 Q. Skipping to something that you covered with Major Fein
11 towards the end of your direct examination, if you see a document is
12 classified, if it is appropriately marked, could you--as you see a
13 document is classified, the review is not yet complete, could you not
14 do an alternative just to, you know--following the assumption you
15 described with Major Fein, could you not do a substitution or an
16 alternative that is unclassified in the interim; an interim response
17 to this particular document that you're looking at?

18 A. I think that would give you, essentially, a false positive,
19 almost, if you will. If the requirement here is to deal with
20 classified information, you have to, essentially, determine what that
21 information is or is not and then move on appropriately at that
22 point. If--it has to be more than simply looking at a marked
23 document and trying to develop unclassified substitutions where that

1 marked document, in and of itself, may be three paragraphs, all of
2 them were portion-marked as classified. At that point in time, what
3 do you substitute for, the entire paragraph or part of the sentence
4 that--that's the part of it that I don't agree with is that you have
5 no real determination of what needs to be substituted for and the
6 only real alternative to that is to take anything that's marked,
7 whether that is a sentence or a whole paragraph, and then try and
8 change that where it may not even be necessary in the long run.

9 Q. But it would still be possible to look at a review, follow
10 the assumption included on the classification markings wherever they
11 are in a document, and then produce an alternative. That's a--that
12 is a physical possibility?

13 A. That is a physical possibility, yes.

14 Q. Now, how--using the CID example that you discussed with
15 Major Fein, how long did it take you to conduct the review of those
16 900 documents? You, personally?

17 A. 4 Days if I remember correctly.

18 Q. And after the 4 days, that's when you sent out the referral
19 to the interested equity holders?

20 A. I believe so, yes.

21 Q. And these interested equity holders all have security
22 personnel, like you, inside their commands?

23 A. From a policy standpoint, correct, yes.

1 Q. Now, you talked about your work in litigation support and
2 you indicated to Major Fein that it was in civil litigation?

3 A. In so far as--we were called on every once in a while to
4 work a FOIA litigation and if the FOIA request dealt with classified
5 information.

6 Q. You also worked in criminal cases or have done this in
7 criminal cases?

8 A. Correct.

9 Q. In federal criminal cases?

10 A. Yes.

11 Q. Do you specifically recall working in a court-martial?

12 A. In a court-martial? No.

13 Q. Do you specifically recall working on a court-martial where
14 the accused was in pre-trial confinement?

15 A. No.

16 CDC[MR. COOMBS]: Thanks Mr. Haggett.

17 WIT: Sure.

18 TC[MAJ FEIN]: Can we have a moment, ma'am?

19 MJ: Yes.

20 [The trial counsel confers with co-counsel.]

21 TC[MAJ FEIN]: Nothing further, Your Honor.

22 MJ: Okay.

23 MJ: Mr. Haggett, I have several questions.

1 directly with three different organizations that had, if I recall
2 correctly, two original classification authorities. It simply took
3 the right people to do the review of the information in question.

4 Q. So, for example, in that case, how long did the
5 classification review take?

6 A. It was 4 1/2 months.

7 Q. When you are involved in FOIA litigation, is that primarily
8 through district court--federal district court?

9 A. That's been my experience, yes, ma'am.

10 Q. Does the court put any suspense dates on when such
11 information is due to the court?

12 A. Down the line, when they're well-past the original filings-
13 -the only suspense dates that I can recall are dates that were
14 established by the court. They could be production notices or simple
15 questions that need to be answered one way or the other. Dates were
16 applied and, in some cases, the counsel would have to go back and
17 renegotiate them because they, essentially, not tenable for one
18 reason or the other.

19 Q. Bear with me just a minute. Just a quick question:
20 these classification reviews, if you have something that is marked as
21 a classified document, an OCA has already determined that that
22 information is classified, why does there need to be another review?

1 A. Assuming that the markings were applied properly, the
2 document could be two years old at that point. My experience is that
3 when I have sent out requests for a classification review, that
4 request, even in basic form, is asking the original classification
5 authority, "Is the information currently and properly classified
6 right now?" Even if it was properly applied 2 years ago or a year
7 ago, the main issue is that classification does time out. It
8 occasionally is overcome by events. And to get to the base line of
9 it, "Is it classified right now," essentially, is the basic question
10 that is being asked.

11 Q. How many original classification authorities--do you have
12 any idea are, for example, in the Department of State?

13 A. The Department of State has a very large number. Several
14 years ago, the President asked all of the executive agencies to
15 reduce the number of OCAs and, if I remember correctly, the State
16 Department brought their numbers down by over 2000.

17 Q. So they--they brought them down by over 2000----

18 A. Down.

19 Q. --so they have more than 2000?

20 A. There's only 2000 now--I believe 2100 in the entire
21 Executive Branch. State brought theirs down by that number and my
22 guess is that they may actually have the lion's share of what's left,
23 currently, now.

1 Q. Do you know how many, approximately, of the Department of
2 State OCAs have been involved in this case?

3 A. In this case, I have no idea, Your Honor.

4 Q. Does--when someone is appointed as an OCA, is there any
5 kind of training or any kind of----

6 A. It's mandatory training.

7 Q. What is it?

8 A. It is, essentially, baseline training on the requirements
9 that must be met in order to classify the information. What we use
10 within the G2 is a slide deck that runs through all the requirements
11 that are laid out within the executive order that must be met for
12 classification in a little bit more understandable way; little more
13 use-friendly.

14 Q. Is it some kind of formal training course or is this
15 something----

16 A. The Defense Security Service, I believe, has an online
17 course; most of it is desk slide.

18 Q. Is there some requirement for completion before someone can
19 be an OCA----

20 A. Yes.

21 Q. --or participate in----

22 A. Yes, ma'am.

23 Q. But what about the staff?

1 A. We require the staff to be trained in derivative
2 classification.

3 Q. And what does that training entail?

4 A. That can be also desk side. The Defense Security Service
5 offers online courses in that. Various agencies, generally, will
6 develop their own training that could also be online; it could in the
7 form of slide deck.

8 Q. Now, did I understand you earlier when you testified that
9 you, basically, did all of the referrals in this case?

10 A. I think I need to be clear, as I recall, what I did was
11 identify the organizations that needed to be involved in the review
12 of the data. I don't recall, quite frankly, whether I actually
13 packaged the data up. I'm not sure that that was the case.

14 Q. Who did?

15 A. I believe counsel did that, Your Honor.

16 Q. So, after the identification process, then, you looked at
17 the information and you said, "OCA A, B, C, D, and E need to be
18 involved"?

19 A. Right.

20 Q. And did you tell--did you relay that to the trial counsel
21 team?

22 A. I relayed that, I believe, to counsel in the Judge
23 Advocate's Office in the Pentagon.

1 Q. So, at that point, was your involvement done? Did they
2 take over from there?

3 A. I was not done. They--my recollection was that that
4 portion of it would be carried out. Subsequently, I had the
5 opportunity to talk to various--the OCA organizations if they had a
6 process question when they were going through and looking at the
7 data.

8 Q. Who was responsible for tracking these referrals to make
9 sure that they were complete?

10 A. I'm not sure I can answer that, Your Honor; I just don't
11 recall.

12 Q. Do you know how long it took the OCAs to complete the
13 classification reviews in this case?

14 A. I don't recall, Your Honor.

15 Q. When Defense Counsel was questioning you, they were talking
16 in terms of 1 year versus 2 years and you were talking about,
17 basically, a single document as the example you were using. Have you
18 ever been involved with a case involving the volume of documents that
19 we have at issue in this case? In your FOIA litigation or some of
20 your other litigation?

21 A. In these numbers? No, ma'am.

22 Q. What is the--in your most complex case that you've been
23 involved or the most voluminous--the case involving the most

1 voluminous documents and number of OCAs to be contacted, if you
2 compared this case to your next level of complexity case, what do
3 you--share that with me so that I can get a flavor of that.

4 A. I think it is probably well beyond it. One of the first
5 things I did when I joined the G2 was to take over a FOIA litigation.
6 That litigation had been going on for, I think, a year and a half at
7 that point in time. In that case, the information was very highly
8 classified. It had to be dealt with by a number of different
9 agencies and, by way of volume, it may have been, in paper copy,
10 about 4 inches thick; whatever that would translate to in pages.
11 That had a number of different original classification authorities
12 that were involved throughout, a number of different executive branch
13 agencies. The difference, I think, in this case is the sheer volume
14 of the data and it is fairly broad spectrum data as well. It is
15 operational data, it is intelligence data, it could be counter-IED
16 information. The bulk of it was--always impressed me more than
17 anything else to try to make sure that it was done properly. It was
18 a little intimidating when I learned of the size of the task ahead of
19 us.

20 Q. The FOIA case that you just described, how long did the
21 classification review process take?

22 A. It was over a year, if I remember correctly.

1 Q. You testified earlier that you did a review of the
2 unclassified CID file to determine whether any of the information
3 should be classified. Let me just make sure I understood your
4 testimony. In the beginning of your testimony, I thought one of the
5 criteria for classification was that the information has to be owned
6 or closely held by the government?

7 A. Uh-huh.

8 Q. If information is, for example, in the unclassified CID
9 review, is unclassified, how do you know that it hasn't already been
10 copied and distributed?

11 A. You, essentially, don't; you need to confirm it. In this
12 particular case, I was aware that it was a law enforcement file from
13 an open case, CID. And when I was asked to look through it, it was,
14 essentially, to confirm--to make sure that there was not an issue.
15 When--in the past, when I've been asked to look at that type of
16 information and if there are sworn statements within the package, I
17 pay extra attention to them because experience tells me that, very
18 often, if a law enforcement agent is speaking to an individual and
19 asking that individual to produce a statement, sometimes information
20 gets into those statements that shouldn't because they're trying to
21 be as clear and complete with that investigator. So again, that's
22 just my experience and that is what I focused on very quickly.
23 Should it have been properly marked? Yes, by policy it should've.

1 This is one that simply got missed and we had the opportunity to,
2 essentially, make sure that it was properly marked at that point and
3 been protected.

4 Q. What do you--describe for me the process that occurs when,
5 for example, under CIPA or Military Rule of Evidence 505, the court
6 determines that certain classified information may be relevant or
7 necessary either in discovery or production and the OCA entity is
8 looking at a substitution. What happens? How does that work?

9 A. My experience with that, Your Honor, was that once--and I
10 think, by and large my most--greatest experience in that was working
11 on the trial of General Noriega some years ago. By and large, they
12 were transcripts of closed session and once the transcripts had been
13 reviewed to determine if they did, in fact, contain classified data,
14 we would, at that point in time, look at the information and try to
15 develop an unclassified substitution that would communicate as best
16 as possible in that light what was being said in the transcript.

17 Q. You said "we." Who does that?

18 A. At that point in time, I was sitting with an individual
19 from the Justice Department, if I remember correctly. Everybody was--
20 -I was there to represent the Army; I was looking for Army data.
21 There were others around the table also representing different
22 organizations. But to develop something that was both unclassified
23 and try to stay online with what was being meant in the discussions,

1 we would offer the substitution, that substitution would then go back
2 to the trial judge----

3 Q. Who has to approve that substitution?

4 A. In this particular case, it was the trial judge.

5 Q. Is there any approval required from the equity holder? I
6 mean, from the Department of the Army, do you just say, "I agree with
7 this," or do you have to get approval somebody else?

8 A. Essentially, at that point in time, I was the equity
9 holder.

10 Q. Were you an original classification authority at that time?

11 A. No, ma'am, I wasn't.

12 Q. Okay. Is there any--so what approval is required for a
13 substitution?

14 A. My way of approval--the requirement I--as best I recall,
15 was that the need for this function to be performed was communicated
16 to the Army and, basically, the Army looked at me and said, "Go
17 forth." And in many cases, though, by the time we were able to
18 develop unclassified substitutions, they were fairly watered-down.
19 It may be the case where an individual's name was mentioned and the
20 name was redacted and the word "individual" was substituted. If
21 there was a particular method was taken out--was redacted, a likely
22 substitution in that case would have been "intelligence method." It

1 was reasonably generic with the eye of, first and foremost being
2 unclassified, but trying to convey what was in the original text.

3 Q. In your earlier testimony--I'm going to shift gears here
4 and talk about the approval process to disclose classified
5 information to cleared--appropriately cleared defense counsel. Can
6 you just tell me, once again, what that is?

7 A. That would be, in basic terms, if there was a need for
8 defense counsel to have access to Army information, we would develop
9 a memo that basically said --okay get the appropriate person to sign
10 on it, and in that case, it was probably going to be the G2--that
11 says, "I recognize that X individual serving as defense counsel is
12 going to need access to classified Army intelligence information. So
13 that covers the requirement, essentially, that information, when
14 accessed by somebody other than an organization that has already been
15 pre-approved, if you will, to access that data. If it--if we were
16 holding FBI information that was classified and that information was
17 pertinent to the case, before we could give that information to the
18 properly cleared defense counsel, we would go back to the FBI, inform
19 them of the situation, and say, "Here are the documents that we
20 believe need to be transmitted to counsel under appropriate
21 conditions. We're, essentially, asking your permission to do so."

22 Q. Is this something that requires OCA approval?

23 A. Yes.

1 Q. Are there certain conditions or criteria that are included
2 in like protective orders or something like that that are included in
3 this approval process?

4 A. By and large it's understood and it's also stated that the
5 individual or individuals have been granted security clearances that
6 the data will be used in a secured facility or on secure equipment.
7 It gets the same protections that it always would.

8 Q. Is there a time period involved in the approval process?
9 Are there any suspenses that, by regulation, by executive, by
10 anything?

11 A. To my knowledge, Your Honor, no. My experience is, again,
12 that that is generally handled within the legal channel.

13 Q. So would your involvement in an approval process be
14 primarily who needs to be contacted? Or would you have more
15 additional involvement?

16 A. In an approval process like that, it, essentially, would
17 stop at, "Here are the organizations that need to be contacted to
18 cover the documents in question," yes.

19 Q. And then, after that, would that be--who takes it from
20 there?

21 A. My experience has been that the--whoever the litigation
22 counsel is would probably communicate that to, generally, a

1 counterpart at another agency. So litigation counsel at the FBI is
2 aware that the request has been made.

3 Q. If someone, I guess, is exposed to classified information
4 and doesn't believe it should be classified, are there any avenues to
5 challenge the classification?

6 A. Yes.

7 Q. What are they?

8 A. Within the executive order, there is a process outlined
9 that allows for a challenge to be made and it outlines the process
10 that would occur once a formal challenge has been made.

11 Q. Did you have any involvement with the CID forensics in this
12 case?

13 A. I'm not sure I follow, ma'am.

14 Q. The--give me a moment. Major Fein what are my other--
15 what's the appropriate verbage?

16 TC[MAJ FEIN]: Ma'am, I think you're asking----

17 MJ: I'm asking for the November--what was finally---

18 TC[MAJ FEIN]: Yes, ma'am, it was----

19 MJ: --approved in November of '11?

20 TC[MAJ FEIN]: --disclosed. The forensic reports, Your Honor---

21 -

22 MJ: Yes.

1 TC[MAJ FEIN]: --the 20--well there's--excuse me, 20 classified
2 forensic reports versus just the normal case file; the CID forensic
3 reports.

4 [Examination of the witness continued.]

5 Q. Did you have any involvement in any referral with CID
6 forensic reports?

7 A. Not that I recall, Your Honor.

8 MJ: Any follow-up based on that?

9 TC[MAJ FEIN]: Yes, Your Honor, but may we take a brief recess?

10 MJ: Certainly. How long would you like? 10 minutes?

11 TC[MAJ FEIN]: 10 is fine, Your Honor.

12 MJ: All right.

13 [The witness was duly warned, temporarily excused and withdrew from
14 the courtroom.]

15 [The Article 39(a) session recessed at 1550, 7 November 2012]

16 [The Article 39(a) session was called to order at 1606, 7 November
17 2012.]

18 MJ: This Article 39(a) session is called to order. Let the
19 record reflect all parties present when the court last recessed are
20 again present in court. Mr. Haggett is back on the witness stand.

21 Major Fein?

22 TC[MAJ FEIN]: Yes, ma'am.

1 [The trial counsel reminded the witness that he was still under oath
2 and examination of the witness continued.]

3 REDIRECT EXAMINATION

4 Questions by the trial counsel [MAJ FEIN]:

5 Q. Sir, just a few questions. I think there is some confusion
6 here--if you could please help explain it--between the referral--a
7 referral between agencies and a request for classification reviews.
8 So, first could you focus on a request? Initially, at the beginning
9 of your testimony you described the process of a request coming in.
10 Who or what entity is typically the requestor?

11 A. Typically, that is someone in the Office of the Judge
12 Advocate General or possibly the general counsel--legal counsel.

13 Q. Okay. So, legal counsel on whatever case you're dealing
14 with?

15 A. Correct.

16 Q. In this case--I know it's odd that I'm asking this
17 question, but who were the requestors to get all the classification
18 reviews complete?

19 A. If I recall, it was the Judge Advocate General's Office.

20 Q. The initial one or are you talking about who it was
21 filtered through?

22 A. To be honest, I don't recall the initial one.

1 Q. Okay. So, this is a request and, again, the requests are
2 to initiate this process?

3 A. Yes.

4 Q. Explain, then, what a referral is.

5 A. A referral would be, essentially, the formal transference
6 of the information with a request that the classification review be
7 executed.

8 Q. So, to the best of your recollection, did the prosecution
9 or a representative at the office of the Judge Advocate General of
10 the United States Army, did they ever request the Headquarters,
11 Department of the Army to actually conduct a classification review of
12 any of the charged information?

13 A. Spoken like that, no.

14 Q. So, you are simply, for lack of a better term, a
15 consultant?

16 A. Correct.

17 Q. And so did you do any of the----

18 MJ: Now, I'm confused. In this case there was a request or
19 there wasn't a request?

20 WIT: The request that I had, Your Honor, was to identify the
21 organizations that should actually do the re-classification review.

22 MJ: And who requested that?

1 WIT: My recollection is that came from the Judge Advocate
2 General's Office.

3 [Examination of the witness continued.]

4 Q. So--and I guess maybe if we could just rewind a little bit
5 more in the process. So, you initially testified today that law
6 enforcement--or prosecutors--or legal counsel, excuse me, come with
7 classified information and need it to be reviewed?

8 A. Correct.

9 Q. And what is your role with the Department of the Army in
10 that initial--what do they do with that with you?

11 A. In that, I will take it and refer it to the proper OCA.

12 Q. So, I assume when you say you refer it, using the term
13 "referral under executive order" that's because the prosecutor or law
14 enforcement have requested the Department of the Army to do a
15 classification review of that information?

16 A. Correct.

17 Q. So, in that capacity, you are doing a referral, right?

18 A. Right. Correct.

19 Q. Now, if the request, for instance, in this case with you
20 being a consultant, for lack of better terms, what was your role?
21 Was it to refer or was it to simply provide advice.

22 Q. And who was that advice to?

23 A. Generally, to the Judge Advocate, if I remember correctly.

1 Q. I'm sorry, just to clarify, when you say, "the Judge
2 Advocate"----
3 A. A representative of the Judge Advocate.
4 Q. Okay, so Headquarters, DA----
5 A. Yeah.
6 Q. --OTJAG?
7 A. Right.
8 Q. Did you ever provide advice to the trial counsel assigned
9 to this case?
10 A. Yes.
11 Q. Trial counsel being the prosecutors in front of you?
12 A. Yes.
13 Q. But you did not conduct any referrals under the executive
14 order for this case?
15 A. No.
16 Q. Are you aware if the prosecutors in this case or their, I
17 guess, proxy at OTJAG submitted any requests for classification
18 reviews to any entity within the Executive Department?
19 A. I believe they did.
20 Q. Are you familiar with OCAs that have been involved in this
21 case with the charged information?
22 A. Yes.

1 Q. Could you please list the ones within the Department of
2 Defense that you can remember?

3 A. Central Command, I believe also, SOUTHCOM, and Joint Task
4 Force Guantanamo.

5 Q. Okay. Was the USAR INSCOM involved?

6 A. Yes.

7 Q. Were there also OCAs involved outside the Department of
8 Defense?

9 A. Yes.

10 Q. Did those OCAs fall within different agencies in executive
11 departments?

12 A. Yes.

13 Q. Did you conduct any referrals under the executive order to
14 anyone for the charged information in this case?

15 A. No, no.

16 Q. However, were requests submitted to these OCAs for them to
17 do classification reviews?

18 A. I believe that's the case, yes.

19 Q. But you had no role in that--direct role in that process?

20 A. No.

21 Q. Are-----

22 MJ: Okay, let me----

23 TC[MAJ FEIN]: Yes, ma'am.

1 MJ: ----maybe you'll help me in the confusion here. We're
2 using requests and referrals. So, were these agencies, CENTCOM,
3 SOUTHCOM, INSCOM, requested to do classification reviews or was there
4 a referral by someone?

5 WIT: There was, essentially a referral by someone, Your Honor.
6 What I was asked to was to, to the best of my knowledge, identify who
7 should receive the referral.

8 MJ: And you told that to OTJAG?

9 WIT: Okay. Major Fein, I'm sorry I interrupted, but I'm--I was--
10 ---

11 TC[MAJ FEIN]: Ma'am, may I have just one quick moment?

12 MJ: Okay

13 TC[MAJ FEIN]: I think we could refresh his recollection here
14 and it will make this much easier.

15 Your Honor, if I may ask the court reporter pull an
16 enclosure from Appellate Exhibit 339 and it's Enclosure number 20.
17 [The court reporter retrieved the document.]

18 MJ: And that appellate exhibit is?

19 TC[MAJ FEIN]: Ma'am, this is Appellate Exhibit 339 and it's the
20 response to the speedy--Defense's motion to proceed to trial. And
21 what this is, in Enclosure 20, is the listing of all the different
22 requests for classification reviews.
23 [Examination of the witness continued.]

1 Q. Mr. Haggett, have you-- were you ever privy to the
2 different requests that were submitted through OTJAG and that you
3 assisted with? Did you ever see any of the requests for assistance
4 for assistance for any of them?

5 A. I may have.

6 Q. Is there anything that would help you remember if you did
7 see them?

8 A. Perhaps a copy of the request.

9 Q. Sir, I'm handing you what's enclosure 20. Could you please
10 look over that request--or that packet of a request and when you
11 done, please look up.

12 [The witness did as directed.]

13 A. I recall them.

14 Q. I'm retrieving from you Enclosure 20 to Appellate Exhibit
15 339. So, Mr. Haggett, we're talking about the difference between
16 referrals agency to agency and requests submitted by the original
17 requesting authority. Who, in this case, originally requested
18 classification reviews.

19 A. I would say, again, I don't recall.

20 Q. Okay. And then what different OCAs were involved within
21 the Department of Defense?

22 A. CENTCOM, SOUTHCOM, Joint Task Force Guantanamo.

1 Q. And for those entities that were involved, did you do
2 referrals of information to them, or was their information requested
3 to be reviewed?

4 A. I am drawing a--having an issue with the use of the terms.

5 Q. Sure, we all are.

6 A. They're interchangeable to me and I, frankly, just don't
7 recall what the events were at that point.

8 Q. Okay. I guess my focus here is really to explain the
9 difference in these terms. So, when you talk--when you originally
10 spoke about "referral," you were referencing Executive Order 13526?

11 A. Uh-huh.

12 Q. So, for that process--well, explain that process, please.

13 A. The referral is the formal request to do the review.

14 Q. Now, is that the formal request from the originator that
15 needs it done, or is that a request
16 by an agency to another agency?

17 A. Agency to another agency.

18 Q. Okay. So--because earlier you testified that you, as the
19 initial entry point of the Department of the Army, would do the
20 review and send it, correct me if I'm wrong, to a----

21 A. In some cases.

22 Q. In some case?

23 A. Right

1 Q. And then that original classification authority, the one of
2 the blue ink pen would then review it and determine if their equities
3 are involved and then what would happen if they find another OCAs
4 entities in their investigation?

5 A. They would then refer those equities to the appropriate
6 classification authority.

7 Q. Okay. So, in this regard, from what you said before, does
8 referral mean from one OCA to another at a formal like--they send it
9 over there to look at it?

10 A. In general terms.

11 Q. Okay. And then, going back to the beginning of your
12 testimony when you said you provided litigation support--

13 A. Uh-huh.

14 Q. --that, normally is initiated by some form of a request in
15 law enforcement or legal counsel. But that is not a referral, that
16 is a request?

17 A. In those terms, yes.

18 Q. Okay, I guess--what--just for the-- going forward so we
19 don't keep getting confused, and I'm only, again, going back to what
20 you originally testified to, referral is between two agencies in a
21 classification review process?

1 A. By and large, I think that--and I apologize for any
2 confusion--if you work in and do this type of thing fairly
3 frequently, the terms become interchangeable.

4 Q. Okay. Okay, but is it, essentially--possibly seamless to
5 you?

6 A. It could be, yes.

7 Q. So, as far as, referrals or requests, you personally did
8 not do either in this case?

9 A. No.

10 Q. And you also testified right before we went on this last
11 recess that typically after you give the--you do, right there, review
12 or you consult and get that information back to legal counsel?

13 A. Yes.

14 Q. Can you explain that more please?

15 A. Yes. My experience has been that it is more efficient to
16 involve the appropriate counsel because it gets the proper attention
17 and focus and generally tends to happen more quickly because it's
18 getting the oversight of the legal counsel--and whether that's the J-
19 2 or--pardon me---SJA, or a command counsel somewhere.

20 Q. And then out-- is that true, also for outside the
21 Department of Defense?

22 A. Yes.

1 Q. Could you explain--you used the term earlier, "Litigation
2 counsel." What do you mean by that?

3 A. Just that it would happen to be that attorney that was
4 working on that particular bit of litigation or if you are making a
5 referral to an agency that, essentially, is not expecting it, it's
6 wise, sometimes, to suggest to counsel that they reach out to their
7 counter-part at that other agency and the individual that's
8 responsible for litigation.

9 Q. And, again, just for clarification, because, now, you just
10 counseled twice too. So, a legal counsel you're talking about, the
11 requesting legal counsel and let's bring it back to this place.

12 A. Litigation counsel. Somebody that's for--like litigation
13 division within OTJAG.

14 Q. Okay. So for this case, though, that would be what? The
15 prosecution?

16 A. Yes.

17 Q. And when you say, "litigation counsel at other
18 organizations," you mean lawyers at the OCAs organization?

19 A. Yes.

20 Q. And why--so, you explained why that seems to be more
21 efficient, what's the alternative?

22 A. If it is--again, depending upon--I say it's more efficient
23 because I base that on experiences that I've had in working FOIA

1 requests and other declassification requests similar actions that
2 normally go into a well-defined pipeline and can take quite some
3 time. If it is a request, again, that is borne out by a legal
4 requirement, it tends to get a better reaction if the counsels--all
5 appropriate counsels are aware.

6 Q. Are you aware if that happened in this case?

7 A. I believe that there--at least with CENTCOM, I know they
8 were aware and I believe also with Joint Task Force Guantanamo.

9 Q. Sir, also suspense dates were asked earlier by the military
10 judge to you and I think, specifically, the question was, "Could the
11 Headquarters, Department of the Army G2 impose a suspense date on
12 Army organizations?" How many--to the best of your recollection, how
13 many Army organizations were involved with this case? How many Army
14 OCAs? Excuse me.

15 A. Two to three, probably.

16 Q. Okay, sir. And then for the main OCAs, you just mentioned,
17 for instance, one--you actually mentioned two. You said, "CENTCOM, a
18 combatant command, a COCOM, and SOUTHCOM, JTF-GTMO which is a
19 subordinate of SOUTHCOM. Does the Headquarters, Department of the
20 Army, Army G2 have tasking authority over combatant commands?

21 A. No.

22 Q. Can they enforce a suspense on a combatant command?

23 A. I've never been able to, no.

1 Q. Okay. What about on DOD organizations at the higher
2 headquarters?

3 A. No.

4 Q. And then what about other agencies outside the DOD
5 Departments?

6 A. Again, no.

7 Q. Sir, especially after I just handed you Enclosure 20, are
8 you familiar, at least, with the trial counsel requests that were
9 made in this?

10 A. Yes.

11 Q. Did those requests impose suspense dates?

12 A. I don't--I did not notice them in the--but--ancient memory
13 says that there was a request to have them done by a date.

14 TC[MAJ FEIN]: Okay, sir. Well, thank you very much.

15 **RECROSS EXAMINATION**

16 **Questions by the assistant defense counsel [MAJ HURLEY]:**

17 Q. Hi, Mr. Haggett.

18 A. Hi.

19 Q. Sir, when were you first contacted with respect to this
20 case, *US v. Manning*? Do you remember the month and year?

21 A. I don't recall

22 Q. Do you recall when the first request from the prosecution
23 went out?

1 A. I don't, I'm sorry. I should caveat that by saying, from
2 the standpoint of security policy, when the WikiLeaks issue occurred,
3 I lived and breathed it for quite some time. And events get--tend to
4 get lost in that. I was very involved with that from a policy
5 standpoint trying to make sure we reissued policy that everybody was
6 aware of it.

7 Q. Well, let me recast my question, then, Mr. Haggett. When
8 do you recall beginning work on the WikiLeaks issue?

9 A. Right after it happened.

10 Q. Do you recall the month and year of that?

11 MJ: Can I stop for just a minute. "It" happened? What is
12 "it"?

13 WIT: The publishing of the document. June of '10, perhaps?

14 Q. And you said you don't recall when the first request was
15 made?

16 A. I do not, no.

17 Q. Would it surprise you if it was made in--on 18 March of
18 2011?

19 A. No, I mean that sounds reasonable.

20 Q. From your perspective on--working on this case, can you
21 explain the delta why the issue first comes up in June of 2010 and 9
22 months later?

23 A. By and large, no, because I was not driving the issue.

1 Q. Now, there's been some discussion about a referral, a
2 request, what have you. When that pass--is passed down to the OCA,
3 you don't know why it takes as long as it takes? And when I say
4 "you," I mean Mr. Haggett, working at Army 62.

5 A. Truthfully, no, that's correct.

6 Q. So, you don't know what staff section is the lead agent?

7 A. No.

8 Q. Don't know who all they have working on it?

9 A. Uh-uh.

10 Q. Don't know how many people, in total, they have working on
11 it?

12 A. No.

13 Q. No idea at the time that's being taken as a result of a
14 personnel shortage.

15 A. Correct.

16 Q. No idea if the time being taken is a result of inattention?

17 A. Again, correct.

18 Q. No idea if the time being taken is the result of a
19 malfunctioning computer disc?

20 A. Correct.

21 Q. Now, there's a lot of information in this piece, but you
22 would agree that there's significant groups of information in this
23 case, right? Like Department of State information?

1 A. If you break them up between state and defense, correct.
2 Q. Operations information which you alerted to earlier?
3 A. Sure.
4 Q. Alluded to earlier, I'm sorry.
5 A. Uh-huh.
6 Q. Intelligence information?
7 A. Uh-huh, correct.
8 Q. Now--and I think you were talking about it before when you
9 began work on this case in June of 2010, but what does an OCA do when
10 notified that their classified information has, perhaps, been
11 compromised?
12 A. That could take several forms and I think that it would
13 depend on the organization.
14 Q. What's 380-5 tell them to do?
15 A. 380-5 essentially requires that, if there is a discovered
16 leak of the information, that the preliminary inquiry is supposed to
17 be done. In this particular case, given the nature of it, I don't
18 know if any of the OCAs actually did a preliminary inquiry. I think
19 it is certainly possible that the OCAs that were involved may have
20 been focused on one, that first identifying what, if anything,
21 belonged to them; two what, if anything needed to be mitigated, i.e.
22 if there was a source--an intelligence source identified, if there

1 was Privacy Act data in it, that would probably be their first
2 actions to be taken.

3 Q. How do you determine the duration of classified
4 information?

5 A. That's laid out within the executive order. There are--
6 there is a baseline requirement that a sunset be put on the data.
7 There are general guidelines on how to apply period of time to some
8 specific different types of information.

9 Q. All of that's include in the EO?

10 A. In general terms, yes. In more specific terms in DoD and
11 in Army policy.

12 Q. Can classified information be remarked?

13 A. It can.

14 Q. What's the process to do that, briefly?

15 A. You would essentially begin review of the data. If it is--
16 if you've done a review of it and determined that a Secret document
17 no longer requires classification, you would strike through the
18 classification markings, stamp it Unclassified, and note when and
19 where and who did it--who took that action.

20 Q. Now getting back to this FOIA case that you talked about
21 with the 4-inch thick----

22 A. Uh-huh.

23 Q. --that occurred in 1988?

1 A. Correct.

2 Q. It's safe to say that there's been a communications
3 revolution, even inside of the Pentagon, since 1988?

4 A. Uh-huh.

5 Q. You didn't have a computer at your desk, probably, in '88?

6 A. No, actually, I did.

7 Q. But you have a much----

8 A. A much quicker one now and much more secure to be sure.

9 Q. Right. Thank you. And in that FOIA case, the defendant
10 was not in pre-trial confinement?

11 A. Nope.

12 Q. Now, you talked about the in--the non-responsiveness of the
13 COCOMs to a suspense date from Army G2?

14 A. I believe that was mentioned, yes.

15 Q. Right. Is there an entity to whom the COCOMS would be
16 responsive to inside the Executive Department?

17 A. The Joint Staff or the Department of Defense.

18 Q. And is there an entity to whom those other federal agencies
19 would be responsible to inside the Executive Department?

20 A. Either----.

21 Q. Everyone's got a boss?

22 A. Everybody's got a boss, certainly.

1 Q. Thanks, just one second. Now, with respect to a
2 classification review, Mr. Haggett, if I understand your testimony,
3 the purpose of a classification review is to determine whether or not
4 this information is currently classified?

5 A. Correct.

6 Q. There is--is there an official process to determine if a
7 classified document was--that's been disclosed to unauthorized
8 persons, was classified at the time of the disclosure or was it the
9 same classification review?

10 A. It can be the same or you could also ask, for
11 determination, "was the document originally inappropriately
12 classified when created?"

13 Q. Do you see the difference in the inquiry?

14 A. Certainly.

15 Q. It would be much easier to determine if something was
16 classified--not if it properly classified, but classified at the time
17 of the--at a specific time--whether or not it was classified?

18 A. Whether or not it was classified properly, you could take
19 it back to origination and ask that question or I suppose any time in
20 the interim between creation and current.

21 Q. And it would be easier just to determine if something was,
22 at a particular point in time, classified, period?

1 A. At a particular point in time? The easiest way to
2 determine that is, from my experience, is it currently classified
3 right now.

4 Q. Okay. So asking the same question?

5 A. Uh-huh, you could.

6 Q. There's no shortcut to say instead of "is it properly
7 classified now" just "was it classified at the time of the release?"
8 That is--the second question is subsumed in your mind to the first?

9 A. Correct, yes.

10 Q. And there's no official mechanism just to do that?

11 A. No. In fact, most of--there is a policy within the
12 department that basically outlines that, if classified information
13 should make its way into the public domain, that that bears,
14 essentially, no effect on the status of the document--status of the
15 information.

16 Q. Now, you said, before. the 385--380-5 says you should
17 conduct a classified review after information is leaked----

18 A. If there's----

19 Q. ----start a classification review?

20 A. ----an unauthorized disclosure of classified information,
21 there's a process outlined within the regulation that's known as a
22 preliminary inquiry that should be conducted to determine what
23 happened and why and that needs to be the next step.

1 Q. You said, before, the OCAs may have been more focused on
2 mitigating than doing this preliminary inquiry?

3 A. I think that--I need to draw the distinction that, in both
4 Army and DOD policy, a preliminary inquiry is generally intended to
5 deal with a fairly low-level security incident or infraction.
6 Clearly in this case, it was very evident and, I would imagine
7 explicit in some cases, that others were already investigating what
8 was going on, so there really would be no need to do a preliminary
9 inquiry like that.

10 Q. But all of that surmising is guess work, really, for you
11 right now with respect to this--to the WikiLeaks?

12 A. As to whether or not it was being investigated? No,
13 because I was aware of it at the time and I think most of the
14 original classification authorities would also be aware of the fact
15 that we've had an unauthorized disclosure, it's being investigated.
16 When it first happened, that's, you know, what happens in such cases.

17 ADC[MAJ HURLEY]: All right. Mr. Haggett, thanks

18 WIT: Sure

19 MJ: Mr. Haggett, I have a couple of follow-up questions based
20 on that.

21 WIT: Sure.

22

23

1 **EXAMINATION BY THE COURT-MARTIAL**

2 **Questions by the military judge:**

3 Q. Defense counsel asked you about the distinction between the
4 question of whether something is classified--you can determine if
5 something is classified at the time of disclosure versus whether it
6 is classified now. Is there--when someone--when an OCA classifies
7 information, is there some record made at the time the information is
8 classified?

9 A. Not in so far as--is there a ledger kept? No.

10 Q. Just--maybe--just describe the process. OCA has
11 information that the OCA believes needs to be classified. How does
12 that work?

13 A. If I'm working from a classification guide issued by that
14 OCA and, if in 1990, I'm looking at that guide and I decide that that
15 document needs to be marked as classified--it needs to be
16 classified, I'll apply the guidance that's in the classification
17 guide, mark it properly, and then send it to wherever it needed to
18 go.

19 Q. Okay. Now, well--you were saying that you do that, so----

20 A. I'm using myself as an example.

21 Q. So, as an OCA or does somebody--can somebody else do it?

1 A. Somebody else can do it. If I'm using the guide, the OCA
2 issues the instruction, the classification guide. So then, anybody
3 with a clearance can apply that guide.

4 Q. So, anybody with a clearance can classify information?

5 A. Derivatively, yes. That's when they're taking it from one
6 to the other or they're using a classification guidance to apply the
7 classification.

8 Q. So this may--I don't mean to interrupt you, but assume
9 you've got somebody with a clearance who likes to classify
10 information--they classify everything they see. I mean, what's to
11 stop that?

12 A. There are prohibitions on applying classification when the
13 requirements of the executive order are not met. And, in that case,
14 if that individual is not an OCA, is not working from a
15 classification guide, is not working from an originally classified
16 document, then, according to the order, this would not apply. It
17 would be mal-applied or misapplied, if you will. That is also
18 promulgated in DoD and Army doctrine. I think that, if you're--if
19 the question is asked, "Is information currently and properly
20 classified in real time," you can also inquire, "Was the
21 classification, when it was originally applied to that information,
22 appropriate?" That's a reasonable question to ask of an OCA. You
23 can take that back to creation of the information, itself, and it

1 would apply to anywhere in the line, if you will, between creation
2 and now.

3 Q. When the OCA originally classifies something, is there a
4 record kept?

5 A. I think that the record would be, essentially, the
6 classification guide, itself. If I am PEO Soldier, I do have
7 classification authority, there is some new night vision equipment
8 and I have decided, upon advice provided to me, that certain
9 information dealing with that advice needs to be classified, I will
10 have the staff put together a classification guide. Guides are
11 intended and required to be as exacting as possible so that only that
12 which is classified gets marked as classified. If it's something
13 that is not classified, it's marked as unclassified. The proper
14 length of classification is also listed in the classification guide.
15 So, that would be applied, again, by a derivative classification. An
16 individual who is using that guide--that, by way of a record, that
17 would probably be the best one that an OCA has determined the need to
18 mark certain information as classified. They put together that
19 index, it's signed and dated by the OCA when it's issued and that is
20 made available to anybody that needs it.

21 Q. So if--I guess where I'm looking at this is--a
22 classification review--and correct me if I'm confused. I mean, it
23 appears necessary for--to see if derivative classifications are

1 actually properly classified in accordance with a classification
2 guide----

3 A. Correct.

4 Q. ---but would you need that to determine if originally
5 classified information is properly classified? Would your original
6 classification be enough?

7 A. If you have a document that is a year old, I put it
8 together, I marked it as classified, and I was using a classification
9 guide from PEO Soldier, if a need arises a year down the road to
10 confirm that, to do a classification review, that's exactly what's
11 going to happen. It's going to go back through; the reverse process
12 is going to happen. Staff will look at it, determine if I applied
13 that classification properly and, if I didn't, they will so state and
14 it'll be remarked. If I did, then it will be confirmed by the OCA.

15 Q. Did this case--the vast volume of information in this case,
16 is it originally classified information or derivatively classified?

17 A. Derivatively.

18 Q. Derivatively?

19 A. Yes. It would surprise me that much of any of it would not
20 been derivatively classified.

21 Q. You talked about a preliminary inquiry is normally done or
22 is required by AR 380-5----

23 A. Uh-huh.

1 Q. ----when there's been a compromise of classified
2 information----

3 A. Unauthorized disclosure.

4 Q. Unauthorized disclosure----

5 A. Correct.

6 Q. ----excuse me. Does that include--is a classification
7 review part of that process?

8 A. It can be, yes.

9 Q. Does it have to be?

10 A. No. An inquiry can be something as simple as somebody
11 forgetting to lock their safe.

12 Q. Just, again, to make sure I understand, did I understand
13 your testimony to be, in your parlance, a referral and a request are
14 basically the same thing?

15 A. I'm afraid I used them interchangeably.

16 Q. Are they supposed to be used interchangeably? I mean, is
17 there a distinction between the two?

18 A. I believe the distinction would be that, within the
19 executive order and DOD and Army policy, the term referral is used in
20 order to communicate the fact that an OCA that originally classified
21 the data needs to make that judgment. I cannot do it as PEO Soldier
22 if it was classified by the J-2 of CENTCOM. I need to send it to J-2
23 CENTCOM and the reverse would be true.

1 Q. Is that a formal process? Does it require certain things,
2 or is it just, "I'm going to call the OCA of this other--hey, I got
3 some information that might be yours"?

4 A. It simply requires that whoever is working the action, if
5 you will, needs to get in front of the proper individuals and
6 organization.

7 Q. And did I understand your testimony correctly, in this
8 case, the TJAG reached out to you to identify who needed to be
9 contacted and then they took it from there?

10 A. Yes, Your Honor.

11 MJ: Anybody else have any follow-up based on that?

12 TC[MAJ FEIN]: No, ma'am.

13 ADC[MAJ HURLEY]: Ma'am, one question--or a series of
14 questions.

15 **REXCROSS EXAMINATION**

16 **Questions by assistant defense counsel [MAJ HURLEY]:**

17 Q. I just want to make sure I understood you correctly, Mr.
18 Haggett. An actual unauthorized disclosure would not require a
19 classification review?

20 A. If it's an actual unauthorized disclosure, it would.

21 Q. All right.

1 A. Again--but the preliminary inquiry would apply to an
2 unauthorized disclosure. It also applies to a security infraction---
3 -
4 Q. Like leaving a safe open.
5 A. ----a security incident like leaving a safe open, right.
6 ADC[MAJ HURLEY]: Thanks, Mr. Haggett.
7 WIT: Sure.
8 MJ: Anything further from the government?
9 TC[MAJ FEIN]: No, ma'am.
10 MJ: Let me just look over my notes quickly to see if I have
11 anything else.

12 **EXAMINATION BY THE COURT-MARTIAL**

13 **Questions by the military judge:**

14 Q. After you were consulted as an expert in these things and
15 who to contact and the DA entity--CENTCOM, SOUTHCOM, Joint Task Force
16 GTMO--did you have any other involvement at all or contact with the
17 original classification authorities with respect to either the
18 classification review or approvals to release to defense counsel?
19 A. To the latter, no. To the former, yeah, I had some contact
20 when questions about process arose.
21 Q. Can you talk about that in a little more detail?
22 A. Essentially, what was needed--what I recall from,
23 especially CENTCOM, is those who were working it were anxious that

1 they were performing the proper process in working the request--the
2 referrals, rather, excuse me. And if they had process questions,
3 sometimes they were--I was made aware of them and tried to respond
4 with what the proper process would be.

5 Q. Can you just give an example of a process question?

6 A. They may come and ask, "We've had the security people look
7 at it and the subject-matter experts from the security standpoint,
8 does anyone else have to see it?" My response in that case would be,
9 "Only the original classification authority when he's doing the
10 actual approval." It was mechanical, if you will.

11 Q. Was it frequent contact or sporadic?

12 A. Sporadic, I would say.

13 MJ: Any follow-up based on that?

14 TC[MAJ FEIN]: No, ma'am.

15 ADC[MAJ HURLEY]: Ma'am, can I have the Court's indulgence to
16 ask a few questions?

17 MJ: Yes.

18 ADC[MAJ HURLEY]: Thank you.

19 **RE CROSS EXAMINATION**

20 **Questions by assistant defense counsel [MAJ HURLEY]:**

21 Q. You said that some of the information or the majority of
22 information you thought was derivatively classified?

23 A. Correct.

1 Q. Right. Now, let's just deal with the blocks of information
2 from the Department of Defense. You had SIGACTs, correct?

3 A. Uh-huh.

4 Q. And are you familiar with SIGACTs?

5 A. From the Central Command, yes.

6 Q. Do you know Significant----

7 A. Significant Activity, correct.

8 Q. Do you know how it's created?

9 A. How and when, what format it takes? Not really.

10 Q. So, with regard to how it's graded, do you know that, you
11 know, there's a unit out, something happens----

12 A. Right. Uh-huh.

13 Q. ----they report it. They're reporting information,
14 information gets typed up by a specialist----

15 A. Uh-huh.

16 Q. ----and then that information, then, get's forwarded up the
17 chain?

18 A. Okay. Correct, yes.

19 Q. And then it land into the into the CIDNE database, you
20 understand that, right?

21 A. Right.

22 Q. So, in that instance, it goes into the CIDNE database and
23 it's classified as----

1 MJ: Is it the right database?

2 TC[MAJ FEIN]: It's a CIDNE database, I'm sorry, Your Honor.

3 MJ: Okay.

4 Q. And that process, there's no derivative classification,
5 correct?

6 Q. No, if recall correctly, the CENTCOM classification guide
7 did outline, if I recall correctly, that SIGACTS and Situation Report
8 were to be classified at a specific level for a specific amount of
9 time. So, that's what I meant about derivative. CENTCOM does have
10 classification guides that deal with that type of data and that could
11 be an administrative office or a platoon sergeant or whomever, could,
12 when they're putting into final, as long as it's been handled as
13 classified, they would apply the classification that is required
14 under the CENTCOM guide.

15 Q. All right. So, in that instance, then, the CENTCOM guide
16 would have said, "All SIGACTs are classified as Secret----

17 A. Correct.

18 Q. ----and then just because it's a SIGACT and goes into
19 CIDNE, it's secret."

20 A. Correct.

21 Q. All right.

22 A. If that's what it says, yeah.

1 Q. Okay. All right, so no problem there. Now, the detainee
2 assessment brief from GTMO, are you familiar with those?

3 A. Uh-huh, yes.

4 Q. And those, obviously, are also--do not--the process of how
5 those detainee assessment briefs are created?

6 A. In very vague terms.

7 Q. All right. And when you use the term "derivative," are you
8 using that term because you believe, again, there's a classification
9 guide out there that says----

10 A. Correct.

11 Q. ----detainee assessment brief from JTF GTMO is going to be
12 classified as Secret.

13 A. Correct.

14 Q. Okay. So, it's not somebody getting information and going,
15 "Oh, I see over here this OCA has already classified it, now I'm
16 going to derivatively classify it"? Do you understand that?

17 A. I do. The bridge there is that the OCA, in the case of
18 CENTCOM, has issued a guide policy as to how this needs to be handled so
19 the creator of the document will be working off the guide, itself.

20 Q. Okay. So that classification guide would give you the
21 blanket, "Hey, anything that falls under this area bucket, for
22 example, is going to be Secret, regardless"?

23 A. In general terms, yes.

1 Q. Okay. So then the other bits of information in this case
2 that deal with Power Points or videos or what not, did you have any
3 involvement looking at that stuff?

4 A. Uh-huh, yes.

5 Q. And that stuff, then, I think might fall into the typical
6 idea of what derivatively classified, would you agree?

7 A. I think it would be, in my view, the same. If you had a
8 slide deck that dealt with IEDs, it is certainly possible that there
9 could be a number of classification guides that would deal with
10 information that could be in such a briefing, for lack of a better
11 term.

12 Q. And we use the lay person's understanding of derivative for
13 that slide deck. We use your example, "If I was doing a slide deck
14 and it had a slide deck on IEDs and I pulled information that's
15 labeled "Classified" and I created a slide from that document, that
16 would be an example of derivative----

17 A. It would.

18 Q. ----classification. I then would put, "Classified Secret"
19 on the slide deck, right?

20 A. Correct.

21 Q. Okay. Now the loss of information, even though we have a
22 lot of volume, we talk about the idea that you have set area of

1 discreet blocks of information; DoD blocks of information and
2 Department of State blocks of information, right?

3 A. Okay.

4 Q. Is that correct?

5 A. I believe that's correct, yes.

6 Q. And, within the Department of State, even though you might
7 have--well, you do have a few hundred thousand documents that we're
8 talking about, that's all within the Department of State, right?

9 A. Correct.

10 Q. And with the Department of Defense, the vast majority of
11 the documents we're talking about are SIGACTs, correct?

12 A. I don't think I'd characterize it that way.

13 Q. Well, if I take out----

14 A. From what I recall of it.

15 Q. Right. If I take out the Iraq SIGACTs and Afghanistan
16 SIGACTs----

17 A. Okay.

18 Q. And all I have left is detainee assessment briefs, the few
19 slide decks, and a couple of videos, you would agree with me that the
20 lion's share of the information we're talking about was SIGACTs?

21 A. Under your presentation, I would agree with you. I do not
22 recall it that way from what I reviewed. The documents, as best I

1 recall them, were Significant Activity Reports, intelligence

2 summaries----

3 Q. I'm going to stop there for a moment. The intelligence

4 summaries----

5 A. Uh-huh.

6 Q. ----you're talking, like, from slide decks and stuff,

7 you're not talking about actual--or are you talking about the

8 detainee assessment briefs?

9 A. When I say "intelligence summaries," it could have been

10 information that was within something dealing with IEDs because that,

11 generally, you're going to have some intelligence in there one way or

12 the other. I think, though, that it is my view--I don't recall it as

13 being that easily parsed when you went through it.

14 Q. Okay.

15 A. Certainly, there's going to be a lot of Significant

16 Activity Reports or a--any of the other more routine areas. However,

17 that, in and of itself, doesn't necessarily drive what may or may not

18 be sensitive that's in those reports.

19 Q. Okay. And, again, my question is, though, that you would

20 not or you would agree that the lion's share of the information from

21 a DOD standpoint was the SIGACTs? The roughly 92,000----

22 A. I can't say that. I just don't remember it that well.

23 Q. Okay. You don't recall?

1 A. I don't remember it being a preponderance of Significant
2 Activity Reports. I remember it in different types of data that were
3 there.

4 ADC[MAJ HURLEY]: Okay. All right. And then--actually, no,
5 that's fine. That's all the questions I have for you.

6 MJ: Anything from the government?

7 TC[MAJ FEIN]: No, Your Honor.

8 MJ: I've got a couple more.

9 **EXAMINATION BY THE COURT-MARTIAL**

10 **Questions by the military judge:**

11 Q. Let's assume----

12 A. Sure.

13 Q. ----for the sake of argument--let's use the SIGACTs for
14 example. If you have a block of similar data, how does that impact
15 the--is the classification review process different for a block----

16 A. No.

17 Q. ----if you have a hundred thousand----

18 A. No.

19 Q. ----data----

20 A. No.

21 Q. ----SIGACTs versus a variety of slide shows and videos or
22 whatever you have? What--how does that impact your classification
23 review?

1 A. It really doesn't. A point may be informative in that--in
2 a Significant Activities or Situation Reports; there are a lot of
3 both. If it is--CENTCOM's classification guidance, if I recall,
4 dealing with a Situation Report or SIGACT, it could have been either
5 one, required that they be classified, but the duration of the
6 classification was fairly short, there is additional information that
7 lengthened the duration of classification if it included specific
8 types of information, specifically, if it had anything to do with
9 IEDs. It may or may not have been intelligence data, it may have
10 been what the unit observed that extended the length of
11 classification.

12 If it had information dealing with a prisoner of war, that
13 was another layer on top of it. So, point being--maybe I did not
14 communicate real well--was that you can have a fairly routine
15 document in front of you that could have, simply, the basic "we were
16 at point x at 1300, there was nothing going on, we moved on," or that
17 "we were at point x, we saw evidence of an IED emplacement, we took
18 five people into custody," at that point. There are three different
19 levels, there are three different sections of a classification guide
20 that would need to be consulted on how to deal with a classification
21 review of that particular piece of information.

22 Q. The final end-product of a classification review, what is
23 it?

1 A. It is a determination by the original classification
2 authority as to what is the current state of that information. That
3 could be to confirm that it's classified, it could be to confirm that
4 half of it is classified, that during that process, 50 percent of it
5 was declassified, or any combination thereof. It's simply a report
6 out of what the result was of the review.

7 Q. Is there a typical length of these that usually exists?
8 Are they 1 page, 10 pages, 100 pages?

9 A. The actual report back?

10 Q. Yes.

11 A. One or two pages, perhaps, in an affidavit; perhaps three.
12 It depends on how much detail they would need--feel they needed to go
13 into.

14 Q. Is there any correlation between the length of the end-
15 product report and the complexity of the classification review?

16 A. There could be. It may be in the end that a number of
17 different documents could be combined and reported out on one
18 affidavit. And that's going to, generally, contain what the results
19 were. It may or may not contain a page count. Again, it could be
20 one page, it could be 100, and may not necessarily define how long
21 the process took to come to that end-product. By and large, it
22 simply says, "We took it, here is the process that we went through,
23 this is the result."

1 MJ: Any follow-up based on that?

2 CDC[MR. COOMBS]: Sorry, Your Honor, but yes, I do.

3 **RECROSS EXAMINATION**

4 **Questions by the civilian defense counsel [MR. COOMBS]:**

5 Q. You said that the SIGACTs-- there could be multiple layers
6 as to why a particular SIGACT is classified?

7 A. Correct.

8 Q. And you also said, from your memory, you thought the
9 SIGACTs classification under the CIDNE classification guide was
10 relatively short, as far as the duration?

11 A. Under the CENTCOM guide, my recollection is that Situation
12 Reports, I believe is accurate, had a fairly short duration, provided
13 they were fairly vanilla.

14 Q. Okay. Now, when you say "Situation Reports," are you
15 saying "SIGACTs"? Is that the term you're using?

16 A. I would--I'm going to have to leave it as a SITREP because
17 that's how I remember it.

18 Q. All right. So, how about I give you this: if the CIDNE
19 classification guide just simply says, "SIGACTs are to be classified"
20 and that was the base guidance you received so then every SIGACT
21 would just go in to be classified. If you were dealing with a block
22 of information, even though you could find other reasons why that
23 information should remain classified--if the classification guide

1 still said that information should be classified and the duration
2 still covered that information, you would agree that, then, you could
3 easily determine that all that information is properly classified and
4 is still classified?

5 A. No. The point of it is that when it's created, every
6 effort is made to apply a reasonable duration for the classification.

7 Q. And let me stop you right there for a moment. Do you know
8 whether or not SIGACTs have on them the duration time period that
9 they should be classified?

10 A. I don't recall.

11 Q. Okay. So, your answer is going to assume, then, that there
12 is a duration listed there, but go on.

13 A. Correct. There's supposed to be by policy. It may say
14 that, base level situation reports need to be classified for up to 10
15 years. If, during a review at the 5-year mark, if, based on the
16 review, there's no real reason to keep it classified any longer and
17 the OCA thinks there's no need for that, it can be declassified at
18 that point. If a 10-year mark is applied, that OCA can override it
19 in a shorter period of time. That's within their purview, if that
20 helps.

21 Q. Okay. So, if you had a group of SIGACTs that, say, were
22 all from 2010 and they were released within months of when they were
23 written, CIDNE classification guide says it's Secret and for this

1 duration, you would be of an opinion, at that point, that you would
2 still have to, then, do a complete review of all the SIGACTs, reading
3 through them to find other bases other than just looking at the
4 classification guide and saying, "They're classified"?

5 A. You could certainly look at the guide. The guide does not
6 give you a real-time pronouncement as to what the current
7 classification level is. The point of the classification review is
8 to put that information in front of the appropriate person to make a
9 determination: "Is it currently classified right now or does it need
10 to be declassified?"

11 Q. All right. So, if I had a CIDNE--a SIGACT that I created
12 today and I put in the database and properly classified it based upon
13 the classification guide, if tomorrow that gets released, you're
14 telling me that tomorrow, then, you're going to have to do a complete
15 classification review on that as opposed to just simply looking at
16 the classification guide and saying, "It was properly classified and
17 still is classified"?

18 A. My response would be that, of course, very likely, if there
19 is an unauthorized disclosure within 24 hours, you're going to assume
20 that, because it is marked, it is properly marked. However, to get
21 to the ground truth to that, my way of looking at it is: I want the
22 appropriate person to make the appropriate determination on that just
23 in case it doesn't meet the requirements now. Duration of

1 classification is often applied--it's required, but it doesn't always
2 wind up being a mandatory thing; it's not etched in stone. That's
3 the way it's required to be marked, but the whole process is built to
4 be able to get to the appropriate people to make a determination if
5 one is needed.

6 Q. Okay. So, in my hypothetical, I create it today, tomorrow
7 it's released, the following day I charge it against whoever released
8 it, we might have to wait 4 1/2 months for a classification review of
9 that one document?

10 A. It's possible.

11 CDC[MR. COOMBS]: Okay. Thank you.

12 MJ: Redirect?

13 TC[MAJ FEIN]: Yes, Your Honor.

14 **RECROSS EXAMINATION**

15 **Questions by the trial counsel [MAJ FEIN]:**

16 Q. Mr. Haggett, using Mr. Coombs's exact scenario, one SIGACT,
17 yesterday, I did--or two days ago, I disclosed it today, I requested
18 classification review. So, in that same scenario, Mr. Coombs said
19 that the classification review says that all SIGACTs are classified
20 at Confidential or Secret level. So, it is a safe assumption to say
21 that, likely, it was classified because it was a SIGACT, but why else
22 does a classification review have to happen on a whole document?

1 A. One, to ensure that the classification--all classification
2 equities are being dealt with.

3 Q. What do you mean by that, sir?

4 A. That you get a real-time confirmation that the information
5 is, literally, classified--is properly classified right now.

6 Q. And just to, I guess, make it a little bit simpler, you
7 used an example before which is there's a SIGACT--you could have a
8 SIGACT--or from your recollection, when defense was asking you this
9 question, there's a SIGACT that can have multiple layers to it,
10 right?

11 A. Correct.

12 Q. So, just because--just as incorrect, but just because a
13 SIGACT, itself, might be classified, there could still be other
14 information in it, correct?

15 A. Sure.

16 Q. So, going back to your example, you've already said today
17 that, during your testimony, that you could have a SIGACT and you
18 could have IED information?

19 A. Sure.

20 Q. So, could you just explain for the court why it is that,
21 just because you have a batch of SIGACTs, that--and you know,
22 hypothetically, all SIGACTs are classified if they fall within these
23 parameters-----

1 A. Uh-huh.

2 Q. ----that are being assumed here and not actually applying
3 to this case, but assuming all that, why would you still have to
4 either refer it out--at least review it and then determine if it has
5 to be referred and keep moving forward to an end point?

6 A. That is the process that's required for classification
7 review. I guess, to me, if you're going to take an administration
8 sanction against somebody, you want to confirm that the information
9 in question was classified.

10 Q. So--but if you have that block of SIGACTs that defense
11 keeps talking about and having you testify about, if it has IED
12 information in it, what do you have to do with that? Is CENTCOM the
13 appropriate authority, although it's a SIGACT----

14 A. It could be, in that case, dealing with IED information.
15 If it's TTP, it could belong to CENTCOM, if it's technical it could
16 belong to JIEDDO----

17 Q. Could there be----

18 A. ----and both would have to review it.

19 Q. Okay. And then could there be a conflict in the level of
20 classification based off those two--one being TTP and one being
21 technical?

22 A. It's possible.

1 Q. Is it possible, again, in the same hypothetical that
2 JIEDDO's classification could be higher than CENTCOM's for this?
3 A. It's possible. It's not likely, but it's possible.
4 Q. Okay. But that--is that the reason why this referral
5 process exists?
6 A. Yes, essentially.
7 Q. Is that also why the complete document has to be reviewed
8 instead of just doing batch reviews.
9 A. Yeah. The process is set up so we don't assume
10 classification. Given the fact that we're out of the normal work-a-
11 day world and we're being asked to literally confirm a batch of
12 information is classified, it meets all the criteria right now, and
13 that's been approved by the appropriate official.
14 Q. I'm sorry, just--or you said, "We don't assume information
15 is classified." I assume you mean for litigation purposes?
16 A. Correct. Absolutely.
17 Q. So, on an everyday basis----
18 A. Yes, we do.
19 Q. ----when you first testified here----
20 A. Yes.
21 Q. ----you said, "Everyone is to assume it's classified"?
22 A. Correct, if it's marked that way, yes.
23 Q. That's for handling purposes?

1 A. Correct.

2 Q. Not for litigation purposes?

3 A. Correct.

4 Q. And finally, sir, this is just, again, to clarify for the
5 court, the court asked you and so did defense: a classification
6 review's end-product, you said multiple times that it would--the
7 product would be--excuse me--whether information is classified today--
8 ---

9 A. Uh-huh.

10 Q. ----could it also be whether it was classified at the time
11 of the compromise?

12 A. Absolutely.

13 Q. What is the end-product based off of--or the end-answers?
14 What drives what----

15 A. The classification review.

16 Q. Sure, but what drives that? Is it a request?

17 A. It's the original request to execute a classification
18 review.

19 Q. Which would include the answer or not--or the proper
20 question or not?

21 A. Correct.

22 TC[MAJ FEIN]: Okay. Your Honor, may I have one moment?

23 MJ: You may.

1 TC[MAJ FEIN]: Thank you, Your Honor.

2 CDC[MR. COOMBS]: Your Honor, I'll resist the urge to step on
3 my co-counsel's toes any further. I appreciate the court's
4 indulgence.

5 MJ: I have one more.

6 **EXAMINATION BY THE COURT-MARTIAL**

7 **Questions by the military judge:**

8 Q. Assume--okay, you have--okay, assume you have something
9 that has been--just say put into a SIGACT or a SITREP or whatever,
10 that you have a guide that says, "If it falls into this category,
11 it's classified."

12 A. Right.

13 Q. So, you have a platoon sergeant on January 1st that thinks
14 he has a SITREP----

15 A. Right.

16 Q. ---puts it in, makes it classified. That SITREP is
17 disclosed on February 1st. On March 1st you have a classification
18 review that says, "You know, that's not really a SITREP. It never
19 should have been classified in the first place." Is it not
20 classified according to the regulation at the moment that
21 determination is made, or is it not--never been classified? So, on
22 February 1st, is it classified?

1 Q. How often do you look at something or, in your experience,
2 have you looked at something and said, "You know what, that never
3 should have been classified?"

4 A. It happens. It's rare, but it happens.

5 Q. Okay. So, in your experience, it hasn't happened that
6 often?

7 A. No.

8 Q. And in your experience, have you had any issues with over-
9 classification?

10 A. In my experience, because I am responsible for the policy,
11 yes, occasionally, you find something that's been marked as

12 classified that shouldn't have been or is marked at a higher level
13 than was called for in the original, but, again, that's pretty rare.

14 Q. Okay. So, where in your experience--are you familiar with
15 the government passing the Over-Classification Act?

16 A. Yes.

17 MJ: The what?

18 CDC[MR. COOMBS]: The Over-Classification Act.

19 Q. So, you're familiar with that?

20 A. Uh-huh.

21 Q. And that was an act that was passed in order to deal with
22 the problem of over-classification? Correct?

23 A. Correct.

1 Q. So, at least somewhere along the line, the government
2 thought that it wasn't a very rare problem?

3 A. I think if you go back and read the act, much of the focus
4 of it is on information sharing and when they're talking about over-
5 classification, they're talking about additional caveats that are put
6 on classified information like "No Foreign Dissemination" or
7 "Original--ORCON, Originator Controlled" because most of the act is
8 focused on the Department of Homeland Security and making sure that
9 information is shared with them--classified information is shared
10 with them as much as possible. It does contain some requirement of
11 the IGs--federal agencies that do have original classification
12 authorities. They're to go out and, essentially, double-check the
13 application of classification. Yes, we've working on it some--the
14 policy side, yes, I'm very much aware of it.

15 CDC[MR. COOMBS]: Okay, thank you.
16 [The military judge inquired, non-verbally, as to whether the trial
17 counsel had any additional direct examination.]

18 TC[MAJ FEIN]: No, Your Honor.

19 MJ: Anything else we need to address before we excuse the
20 witness?

21 TC[MAJ FEIN]: No, Your Honor.

22 CDC[MR. COOMBS]: No, Your Honor.

23 [The witness was excused and withdrew from the courtroom.]

1 MJ: All right. We're scheduled to begin at 0800 on the record
2 tomorrow. Is there anything else we need to address before we recess
3 the court for the evening?

4 TC[MAJ FEIN]: No, Your Honor.

5 CDC[MR. COOMBS]: No, Your Honor.

6 MJ: All right. Court is in recess for the evening.

7 **[The Article 39(a) session recessed at 1722, 7 November 2012.]**

8 **[END OF PAGE]**

1 [The Article 39(a) session was called to order at 0827, 8 November
2 2012.]

3 MJ: This Article 39(a) session is called to order. Let the
4 record reflect that all parties present when the Court last recessed
5 are again present in court.

6 All right. Let's go over a little bit of housekeeping
7 before we proceed with the witness today. Last night I received a
8 prosecution request for leave until 8 November 2012, to notify the
9 Court of response to defense original classification authority
10 interrogatories. Major Fein, would you like to explain that?

11 TC[MAJ FEIN]: Yes, Your Honor. Your Honor, the request you
12 have in front of you has been marked as Appellate Exhibit 379. After
13 session yesterday, the defense and prosecution sat down to discuss
14 the defense's interrogatories and that resulted in an agreement
15 between the parties that the interrogatories--well, first, the
16 government would review the interrogatories and provide input on some
17 of the questions because to the--the government felt some of the
18 answer--or the questions were confusing and couldn't be answered in
19 that form. So, after discussion with the defense [sic] trying to
20 understand what the defense is really trying to ask for, we proposed
21 different language. This morning, we have given that to the defense,
22 they will review it, and then give us back the final interrogatories.

1 Once that's done, of course, we will offer that as an appellate
2 exhibit for the record.

3 The second part, Your Honor, was that the form of the
4 actual responses was discussed and both parties agreed that
5 prosecution would submit these interrogatories--these questions to
6 the different agencies or departments or commands for them to answer.
7 They would answer them back to the prosecution and then the
8 prosecution, through a sworn affidavit or declaration, would provide
9 these to the Court and defense saying that these are, in fact, what
10 we received back from these agencies. So, the end-product would be a
11 consolidated response from the prosecution saying this is what the
12 answers are that we received.

13 And then, because of all that, Your Honor, and the number
14 of questions that were not anticipated when the dates were--excuse
15 me--were originally agreed upon during the last session, the
16 prosecution, then, also has asked the Court to--motion for leave of
17 the Court to move the due date of the interrogatories from 26
18 November until 5 December to answer all--about 137 questions. So,
19 from that, Your Honor, that happened last night. The prosecution
20 submitted a request of leave to answer the Court's question of
21 whether the departments, agency, or command will respond to the
22 interrogatories in lieu of testimony and we ask to respond to the
23 Court today with that answer.

1 MJ: All right. Your motion says the defense doesn't object.
2 Now, there's two, I guess--what's not in the motion is the
3 government's motion to move the due date.

4 TC[MAJ FEIN]: That's correct, Your Honor.

5 MJ: Does the defense object to, one, the motion, itself, to
6 notify me by the 8th of November and due date?

7 CDC[MR. COOMBS]: No, Your Honor.

8 MJ: Okay. One question I do have is if the government comes
9 back to me and says, on 8 November, that one or more of these
10 agencies don't want to participate, I have deferred my ruling on
11 whether to produce these agency witnesses. How do the parties
12 recommend that we proceed, should that occur?

13 CDC[MR. COOMBS]: The government, at least, indicated when we
14 were going through the questions that it didn't appear to be an issue
15 with the OCAs responding to the questions. I don't know if that is,
16 in fact, true, but that was the position that the defense was under.

17 TC[MAJ FEIN]: Your Honor, the United States anticipates that
18 that is going to be the position of all agencies, departments, or
19 commands that they are going to participate, but until I get final
20 acknowledgment today and relay that to the Court, I can't attest to
21 that.

22 MJ: All right. Well should these----

23 TC[MAJ FEIN]: I guess----

1 MJ: ----agencies--should I compel any of these witnesses, they
2 would be testifying the week the of the 10th through the 14th of
3 December, is that correct?

4 TC[MAJ FEIN]: Yes, Your Honor.

5 CDC[MR. COOMBS]: Yes, Your Honor.

6 MJ: Okay. So that would be something we could put on the
7 record at the next session, is that right?

8 TC[MAJ FEIN]: Yes, Your Honor, or depending on what time we get
9 the answers back; it could be today as well.

10 MJ: Okay, so we'll do that. So, the government's motion, then,
11 the government's request for leave until 8 November 2012 at Appellate
12 Exhibit 379, I'm going to rule orally on that. As there's no
13 objection, that motion is granted as is the motion for the response
14 to the interrogatories--moving the response date to 5 December.

15 Please ensure the case calendar is updated appropriately.

16 TC[MAJ FEIN]: Yes, Your Honor.

17 MJ: All right. The parties and I met briefly before we came on
18 the record today for an R.C.M. 802 conference. Once again, that's
19 where I talk about scheduling and other issues that are going to
20 arise in cases. And one of the issues we discussed was the
21 government's 505(g) motion with respect to redactions and
22 substitutions of classified information to be provided to the
23 defense. I have a little bit of confusion with respect to that

1 motion, so I have asked the government to schedule an *in camera*, ex
2 parte proceeding with me, in chambers, today. I believe, Major Fein,
3 you suggested maybe over an extended lunch break for that?

4 TC[MAJ FEIN]: Yes, Your Honor, so we can keep moving today.

5 MJ: All right. Does either side have anything with respect to
6 that motion at this time?

7 CDC[MR. COOMBS]: No, Your Honor.

8 TC[MAJ FEIN]: No, Your Honor.

9 MJ: Okay. Part of that motion, as we discussed yesterday, was
10 the government requested a protective order from the Court to allow
11 the defense to look at some classified information, to include
12 metadata, on some media, within certain parameters that is all in the
13 redacted--motion that has already been filed by the Court.

14 Defense, at this time do you--yesterday, you weren't ready
15 to talk about that. Do you have any objection to an interim
16 protective order only to look at the information and then letting us
17 know if you want to--you know, that you have enough on the metadata
18 side?

19 CDC[MR. COOMBS]: No objection, Your Honor. We'll have our
20 experts look at the information and if the restrictions prevent them
21 from doing something, I'll have them put that in affidavit format and
22 then bring that to the Court's attention.

23 MJ: Okay. So--yes?

1 TC[MAJ FEIN]: And, Your Honor, for the record, the Court asked
2 the government to look at whether we could disclose to the defense--
3 yesterday, the Court asked whether the government could disclose to
4 the defense the different search terms that the prosecution used to
5 search the media and what happened last night after session is the
6 government did provide that information and specifically from the
7 redacted classified portion of the motion that was provided to the
8 Court gave the unredacted search terms on the actual page itself.

9 MJ: Okay. All right. So, Government, if you would then,
10 during a break today, please provide a protective order for me to
11 sign that would allow the defense to review the metadata under the
12 conditions that the government has asked for in its motion----

13 TC[MAJ FEIN]: Yes, ma'am.

14 MJ: ----and I'll go ahead and do that and then, should there be
15 any issues that need to be raised with the Court after your experts
16 have looked at that, Mr. Coombs, certainly feel free to do that.

17 CDC[MR. COOMBS]: Yes, Your Honor.

18 MJ: Are there any other issues that we need to address at this
19 time before we go ahead and call Colonel Coffman?

20 CDC[MR. COOMBS]: No, Your Honor.

21 TC[MAJ FEIN]: No, Your Honor.

22 MJ: Go ahead and proceed. Oh, wait a minute. Before we do
23 that, I do have a couple of questions to ask you. During the 802

1 conference, I did ask you if--we talked about yesterday that we had a
2 notebook of information that involves Colonel Coffman. I had asked
3 you if Enclosure 11 to that was--what you had is Enclosure 78, the
4 Coffman emails were the same thing and I believe at the 802 session
5 you advised me that was correct.

6 TC[MAJ FEIN]: Yes, ma'am.

7 MJ: One other question: Enclosure 1, is that the same thing as
8 Enclosure 80?

9 TC[MAJ FEIN]: I'm sorry, ma'am, do you mean Tab 1?

10 MJ: Tab 1, I'm sorry. Tab 1 to----

11 TC[MAJ FEIN]: No, ma'am, it's not.

12 MJ: It's not?

13 TC[MAJ FEIN]: The--if--Enclosure 80 is spread throughout the
14 binder and if the Court could look at the top of the first page of
15 the table of contents, on the right side of that table of contents
16 are the actual corresponding enclosure numbers. And so, as the Court
17 scrolls down, you'll see the number 80 and that document is also in
18 Enclosure 80 and then that's where it's placed within this binder.

19 MJ: Okay. Say that one more time.

20 TC[MAJ FEIN]: Yes, ma'am. Ma'am, if you are to look at the
21 table----

22 MJ: Oh, I see; corrected copy enclosure. Okay. Got it.

1 TC[MAJ FEIN]: Yes, ma'am. So, the very first one is the
2 Special Court-Martial Convening Authority Extension for R.C.M. 706
3 Report, 12 August 2010, Tab--page number 10, Corrected Copy Enclosure
4 Number 80.

5 MJ: Okay. Got it.

6 TC[MAJ FEIN]: And, ma'am, this binder has been marked as
7 Appellate Exhibit 376a and the defense's additional documents outside
8 of this binder for when the defense questions Colonel Coffman has
9 been marked as 376b.

10 MJ: And the Court will have a copy of that as well?

11 CDC[MR.COOMBS]: I've provided a copy for the Court with the
12 Court reporter, Your Honor.

13 MJ: All right. I have a copy of Appellate Exhibit 376b and I
14 understand, Mr. Coombs, I believe that you said in the 802 conference
15 that you don't have an objection to Colonel Coffman having his own
16 copy of these documents to make the examination of the witness go
17 more smoothly?

18 CDC[MR.COOMBS]: Exactly, ma'am; the defense has no objection.

19 MJ: All right. Please call the witness.

20 TC[MAJ FEIN]: The United States calls Colonel Carl Coffman.

COLONEL CARL COFFMAN, U.S. Army, was called as a witness for the prosecution, was sworn, and testified as follows:

DIRECT EXAMINATION

Questions by the assistant trial counsel [CPT WHYTE]:

Q. And you are Colonel Carl Coffman, Chief of Staff for the Deputy Commanding General, NATO Training Missions, Afghanistan?

A. That's correct.

Q. And the previous--the Special Court-Martial Convening Authority for this case?

A. Yes.

Q. Good morning, sir.

A. Good morning.

Q. Sir, first of all, I just want to thank you for being here today. We do understand that you came all the way from Afghanistan to participate in the proceeding. So, we just want to thank you very much for the effort to come up to--to be here.

And, sir, just to give you a roadmap of where I'd like to ask you questions about, first of all I'd like your background and then following--first of all, I want to ask you some questions about your background, sir following that, the period of delay in this case leading up until when you restarted the R.C.M. 706 in early February following that, the actual delay and actually executing the 706 and

1 then, after that, the delay from when the 706 completed up until the
2 Article 32 investigation.

3 Sir, first of all, some of your background information--
4 sir, what, again, is your current position?

5 A. The Chief of Staff to the Deputy Commanding General, NATO
6 Training Mission, Afghanistan.

7 Q. And when did you assume that role, sir?

8 A. The last week in August.

9 Q. And what was your position before that?

10 A. I was the Commander, Joint Base Myer-Henderson Hall.

11 Q. And for how long were you the commander?

12 A. About 33 months.

13 Q. Sir, if you please, just describe what a commander does on
14 a daily basis?

15 A. As the Joint Base Commander, I was responsible for
16 installation and support services to the active and retired National
17 Guard and Army Reserve--all the Reserve service members in the
18 National Capital Region.

19 Q. Yes, sir. And whom do you rely upon in making your daily
20 decisions?

21 A. Well, I have a staff.

22 Q. And does that staff include the Staff Judge Advocate?

23 A. Yes.

1 Q. Can you also just briefly describe the make-up of your
2 command? Who is in your command?

3 A. We have three locations: Henderson Hall, Fort Myer, and
4 Fort McNair which constitute Joint Base Myer-Henderson Hall. I have
5 a headquarters battalion--Headquarters Battalion, U.S. Army with two
6 companies--two subordinate companies and, in addition to that, I have
7 Special Court-Martial Convening Authority for 6000--6500 Soldiers
8 throughout the NCR--throughout the world, really; other embassies and
9 outlying agencies that the Army supports.

10 Q. Yes, sir. So what does it mean to have Special Court-
11 Martial Convening Authority authority?

12 A. Well, I'm responsible for conduct--conduct the UCMJ in the
13 event that it's required for these individuals.

14 Q. And what type of UCMJ actions are you responsible for?

15 A. Well, it runs the gamut.

16 Q. So, reprimands to court-martial?

17 A. Reprimands to court-martial.

18 Q. Okay, sir. So, of those, you said roughly 6500 Soldiers,
19 how many directly report to you?

20 A. Probably 24 to 30 on any given time.

21 Q. And how many actually work for you?

1 A. Actually work for me? Well, I have probably a dozen at any
2 given time depending on who is assigned to the battalion while we
3 have him do [sic].

4 Q. Can you just explain why there is such a difference in
5 those numbers? You said you have 6500 Soldiers that you generally
6 have court-martial authority over, but then only a handful that
7 actually work for you.

8 A. Right. Well, the--in the TDA that we have--like I said
9 before, we had a headquarters battalion and two subordinate
10 companies. Included in that are the two company commanders and
11 battalion commander that are responsible for basically accounting for
12 all the Soldiers--Army Soldiers in the National Capital Region and
13 the other outlying agencies that we support. They don't directly
14 work for me because they work for the senior officers of those
15 agencies like the Army G1, G2, you know, the entire G-staff or the
16 Army leadership.

17 Q. Yes, sir. And what was your position before you assumed
18 this role?

19 A. I was the executive officer to the Assistant Secretary of
20 the Army for Installations and Environments.

21 Q. And for how long, sir?

22 A. 2 1/2 years.

1 Q. Okay. And can you just explain what your responsibilities
2 were in that?

3 A. I was the--well, when I arrived there, I was the military
4 assistant, so I was responsible--there's a military--it's a senior
5 and civilian SES. He's a political appointee, so any officer--two
6 military officers, fundamentally, a major who is the--or a lieutenant
7 colonel who is the military assistant and the executive officer.
8 One, primarily, is responsible for things outside the office and the
9 executive officer is primarily responsible for things inside the
10 office. I performed both of those duties during various times when I
11 was there.

12 Q. So you do have some experience working with senior
13 government officials?

14 A. Yes.

15 Q. Sir, what was your position before that time?

16 A. I was the commander of the garrison at Hunter Army
17 Airfield, Savannah, Georgia.

18 Q. And sir, just for the record, what is your branch?

19 A. I'm an aviator.

20 Q. Sir, let's move just to your involvement in this case.

21 A. Okay.

22 Q. What, again, was your involvement in this case?

23 A. I was the Special Court-Martial Convening Authority.

1 Q. And when did you assume this role, roughly?

2 A. August 2010; first week of August.

3 Q. And were you the convening authority throughout the
4 proceeding?

5 A. Well, until I changed command.

6 Q. And what is your experience a Special Court-Martial
7 Authority?

8 A. We, typically--well, as a commander in the past--primarily
9 as--most of the UCMJ actions I have, I handle as a--in my last
10 command, as a brigade commander--O-6-level commander, previously, I
11 didn't have too many at all. The--obviously, it runs a gamut from
12 anything from, you know, minor misconduct, to something significant.

13 Q. Yes, sir. So, for the entire 33 months that you were the
14 commander at Joint Base Myer-Henderson Hall, you were the Special
15 Court-Martial Convening Authority?

16 A. Yes.

17 Q. And about how many cases--during those 33 months, about how
18 many cases, on average, did you have on your tracker during a weekly
19 basis?

20 A. Probably roughly a dozen or so.

21 Q. Okay. And what does it mean for--what is this tracker?

22 A. Well, like I said, we had a big population that we were
23 the--that--or I had a big population I was the Special Court-Martial

1 Convening Authority for, so we had a tracker that listed all the
2 actions so that we could, you know--and we got a--I got a bi-weekly
3 update on them and follow-up with where we were and the conduct of
4 getting the----

5 Q. Yes, sir.

6 A. ----getting the UCMJ completed.

7 Q. Thank you, sir. So, this included reprimands, courts-
8 martial----

9 A. It included reprimands, you know, positive urinalysis,
10 DUIs, assaults----

11 Q. Okay, sir. And about how many courts-martial, over you
12 career, have you been the Special Court-Martial Convening Authority?

13 A. Probably--that actually gone to court-martial, a half a
14 dozen or so.

15 Q. So, can you just describe this relationship between trial
16 counsel and the convening authority?

17 A. Well, kind of exactly what you just said. The trial
18 counsel is my legal counsel. As a commander--as a Special Court-
19 Martial Convening Authority, you have a staff and in that staff
20 includes a special staff officer being the Staff Judge Advocate
21 Office and your trial counsel. So, they provide you legal advice.

22 Q. And when making decision as the Convening Authority, do you
23 only rely upon trial counsel?

1 A. No. You rely on your own commander's experience and what
2 your duty is as a commander with trial counsel and, you know, if the
3 defense has anything?

4 Q. So, what generally happens when a trial counsel approaches
5 you with a document for your signature?

6 A. Well, they approach me with a document and we talk through
7 the document--what the contents of the document are and what, you
8 know, potential courses of action are, conducting that action, and
9 then I make a decision of what I think is the right thing to do.

10 Q. Do you take into consideration, not only what the trial
11 counsel says, but defense----

12 A. Well, if the defense has input, yes.

13 Q. Yes, sir. And lastly, sir, what, if any, formal training
14 do you have on being a Special Court-Martial Convening Authority?

15 A. Formal training is that you have the opportunity to go to a
16 Senior Officer Legal Orientation course prior to taking command, in
17 Virginia.

18 Q. And how--do you remember how long that course was, sir?

19 A. I think I was there a week.

20 Q. So, sir, now I want to shift focus from background to the
21 first period of delay, the delay from when you received the case up
22 until you ordered the sanity board to resume in early February.

23 ATC[CPT WHYTE]: Your Honor, may I approach the witness?

1 MJ: Yes.

2 Q. Colonel Coffman, I'm handing you what has been identified
3 as Appellate Exhibit 376a. Sir, these documents are just a handful
4 of the documents I would like to talk you about. I understand the
5 defense would like to talk to you about some of these documents as
6 well. Sir, if you--before opening--if you can please refrain from
7 opening the binder and also flipping through page----

8 A. Sure.

9 Q. I'd greatly appreciate it. Thank you, sir. So, sir, when
10 you----

11 CDC[MR. COOMBS]: If I can get in, Your Honor, we have no
12 objection to him looking at this while the questions are asked, so,
13 that way he has the benefit of having that in front of him.

14 MJ: All right. That's fine, thank you.

15 Q. So, sir, what was the status of the case when the case came
16 to you?

17 A. When the case came to me, there had been a request for a
18 delay in conduct--there was currently under--there was an Article 32
19 request for delay from the defense so the 706 board could be
20 conducted.

21 Q. Okay, sir. And that was before the case came to you, sir?

22 A. Yes.

23 Q. Okay. And did you act on that request?

1 A. I didn't act on that--the request came to me as--well, when
2 the case came to me, it was--it had a delay already in place.

3 Q. And did you order the sanity--a sanity board?

4 A. I did.

5 Q. Sir, can you please turn to tab one, pages 1 through 4?
6 And take a look at those pages and let me know when you're finished.
7 [The witness did as directed.]

8 A. This is my order to conduct a sanity board for PFC Manning.

9 Q. And sir, who is--and so this document is from you, sir?

10 A. Yes, my signature is on it.

11 Q. And who is the document addressed to?

12 A. Chief of Forensic Psychiatry--Psychology.

13 Q. Was that the president of the sanity board?

14 A. Yes, at Walter Reed.

15 Q. And did you consult with trial counsel before ordering the
16 sanity board?

17 A. Yes.

18 Q. What was the suspense for completing the sanity board for
19 this 3 August board?

20 A. The initial defense [sic] I gave them was about 2 weeks.

21 Q. You said, sir, that the defense was responsible for this
22 period of delay? They asked for the delay?

1 A. Not particularly on this request for a sanity board. I
2 ordered a sanity board on the 3rd of August.

3 Q. Yes, sir. Can you please turn to tab 1, page 8? Just take
4 a look at the document, please, sir, and let me know when you're
5 finished.

6 [The witness did as directed.]

7 A. Okay.

8 Q. Okay, sir, and who is this document from?

9 A. This document is from the defense counsel, Major Hurley.

10 Q. And is it addressed to you, sir?

11 A. It's addressed to me.

12 Q. And the date of this memorandum?

13 A. 11 August.

14 Q. And what is this request?

15 A. This is a defense request for a delay for an Article 32
16 until the 706 is complete.

17 Q. And did the defense reference its previous request for
18 delay?

19 A. Yes.

20 Q. And did you act on this defense request for delay, sir.

21 A. Yes, I granted it.

22 Q. Okay, sir. Can you please turn to page 9 of tab 1, and
23 take a look at it, sir, and let me know when you're finished?

1 [The witness did as directed.]

2 A. Okay.

3 Q. What is this document, sir?

4 A. This is my memorandum back to the defense, thru Colonel
5 Almanza, granting the delay of the Article 32.

6 Q. Okay, sir, so, initially, you said that on 3 August you
7 ordered the sanity board and you gave a suspense of roughly 2 weeks.
8 Did the sanity board conclude its report at that time--within the 2
9 week suspense?

10 A. No.

11 Q. Do you remember why, sir?

12 A. They didn't have enough time to complete it--to conduct a
13 thorough review.

14 Q. And sir, could you please turn to tab one, page 10 through
15 16?

16 A. Through 16?

17 Q. Yes, sir.

18 [The witness did as directed.]

19 A. Okay.

20 Q. Okay, sir, are you familiar with this document--or these
21 documents?

22 A. Yes.

23 Q. And what are these documents, sir?

1 A. Well, the first document is my approval of an extension in
2 order to conduct 706, yes.

3 Q. And sir, after that document--what about the subsequent
4 documents?

5 A. Well, the subsequent documents are email discussions
6 between Dr. Sweda and the defense and a copy furnished there as well
7 is the trial counsel.

8 Q. Okay, sir. And did you consider these emails, then?

9 A. Yes, the discussion was the 706 and the length of time it
10 took to conduct a thorough 706.

11 Q. And, sir, what on the document--tab 1, page 10, what was
12 the suspense that you gave for the--the updated suspense for the
13 sanity board?

14 A. 6 weeks from the date of the 12th of August to be the end
15 of September.

16 Q. Okay, sir. So now let's talk about that 6-week suspense.
17 Did the sanity board complete its report within the 6 weeks?

18 A. No.

19 Q. Do you remember why, sir?

20 A. Well, there were several reasons. The sanity board, first
21 of all, had to have the appropriate classified--or security
22 clearances. In order to conduct the board, we had to find the board
23 members and we were getting in the process of--I believe we were

1 going to start a preliminary classification review to determine
2 exactly what PFC Manning was going to talk about in his sanity board.

3 Q. So, outside of the preliminary classification review, were
4 there any other defense requests, to your recollection?

5 A. We had some requests for experts, I believe.

6 Q. Okay, sir. Could you please turn to tab 1, pages 23 and
7 24. And just please read over the document and let me know when
8 you're finished, sir.

9 [The witness did as directed.]

10 A. Okay.

11 Q. And sir, what is the date of this memorandum?

12 A. 25th of August.

13 Q. And who's it from and who's it too, sir?

14 A. It is from the defense to me.

15 Q. And what is this?

16 A. It's a request for an appointment of an expert in forensic
17 psychiatry.

18 Q. And did you consult with trial counsel about this request?

19 A. Yes.

20 Q. Did the defense ask for a delay in the 706 until this
21 expert was appointed?

22 A. I don't recall, particularly, if there was a particular
23 delay requested, but it was going to require a delay based on the

1 fact that we needed to find an expert with the appropriate security
2 clearances.

3 Q. Okay, sir. I'd like just to direct you to paragraph 6 of
4 this document.

5 A. Okay.

6 Q. If you could just briefly read that paragraph?

7 [The witness did as directed.]

8 A. Okay.

9 Q. Okay, sir. So----

10 A. The defense requested a 706 delay until the defense
11 appointed a forensic--a forensic psychiatrist could be made
12 available.

13 Q. And sir, did you act on this defense request for a delay?

14 A. Yes.

15 Q. Sir, could you please turn to page 25 of tab 1?

16 [The witness did as directed.]

17 Q. Have you seen this document before, sir?

18 A. Yes.

19 Q. Okay. And what is the date of this document?

20 A. It's the 25th of August.

21 Q. Okay, sir. And what is this document?

22 A. This is my approval of the sanity board being delayed until
23 we could get the defense expert appointed.

1 Q. And what level of security clearance was required for this
2 expert?

3 A. Well, at this point, what we were thinking is it would
4 probably going to be TS-SCI.

5 Q. Okay, sir. Did the defense request that this expert have
6 TS-SCI clearance?

7 A. I could probably go back and look at the document and see.
8 I don't remember, specifically, what exactly the requested in the
9 security clearance of the expert.

10 Q. So, would anything refresh your memory as to whether or not
11 the defense asked for this expert to have a TS-SCI?

12 A. I could probably go back and look.

13 Q. Sir, could you please turn to page 26 of tab 1?

14 [The witness did as directed.]

15 A. Yes, requested a defense appointment expert possess a TS-
16 SCI clearance.

17 Q. And who is this document from and who is it addressed to,
18 sir?

19 A. The document is for me from the defense.

20 Q. And what is the date of this?

21 A. The 2nd of September.

22 Q. And did you act on this request?

23 A. Yes.

1 Q. Sir, if you could please turn to tab 1, page 27?
2 [The witness did as directed.]
3 A. Okay.
4 Q. Are you familiar with this document?
5 A. Yes.
6 Q. What is the date of the document?
7 A. The 12th of October 2010.
8 Q. And what is this document?
9 A. This document is my--it's a memorandum back to defense
10 counsel approving the defense expert request.
11 Q. Okay, sir. So, you said there were two reasons why the
12 sanity board did not complete its report within the 6-week suspense,
13 one being the defense request for an expert----
14 A. Right.
15 Q. ----the second, you mentioned this preliminary
16 classification review. In its 25--or 26 August 2010 memorandum,
17 what, if anything, did the defense allege that PFC Manning needs to
18 discuss?
19 A. The preliminary classification review was something that
20 was unique to this. This was something that's unusual and my
21 discussion with the trial counsel--so before we appointed a board and
22 even decided that we needed individuals with TS-SCI clearance, we
23 needed to determine--and before contacting the board, we needed to

1 determine if PFC Manning was going to be discussing any classified
2 information during this board process.

3 Q. And, sir, why did you need to determine--why did it need to
4 be determined whether or not the accused would need---

5 A. Well, because the board members that were going to conduct
6 the interview and whatever potential documents were going to come out
7 of the interviews or reports come out of the interviews and there's
8 classified information, that needed to be documented and those
9 individuals need to have appropriate clearances.

10 Q. Yes, sir. And did the defense allege that the accused
11 would need to be able--to talk about TS information?

12 A. Yes.

13 Q. Okay, sir. Can you please turn to pages 28 and 29 of tab
14 1? Sir, just take a look over those documents, please.

15 [The witness did as directed.]

16 A. Okay

17 Q. Sir, what is the date of this request?

18 A. 26 August 2010.

19 Q. And who's it to and who's it from?

20 A. It is to me from the defense counsel.

21 Q. And what is this document?

22 A. This is a request for a delay in the 706 board to comply
23 with prohibitions on disclosure of classified information.

1 Q. And in this document did the defense allege the accused
2 would need to discuss TS information?

3 A. He stated that he would need to divulge classified
4 information.

5 Q. Okay, sir. I'd like to direct you to paragraph 6 of this
6 document.

7 A. Okay.

8 Q. What, if anything else, did the defense request?

9 A. He requested that results of any classification reviews and
10 verifications that we had gotten from the OCAs be released to him as
11 well.

12 Q. And sir, did you delay the 706 until classification
13 reviews were performed and provided to the defense?

14 A. Well, we didn't conduct a classification review on all the
15 documents prior to the 706 board.

16 Q. And, sir, well, did you delay the 706 board until this
17 review was complete?

18 A. Yes, I believe I did; until we completed preliminary
19 classification review.

20 Q. Correct, sir. What about the classification review of the
21 actual charged documents?

22 A. No.

1 Q. No? And why did you not delay the 706 board until the
2 clock--

3 A. Two separate things: 706 board and the Article 32. The
4 706 board is simply to--it is a sanity board for PFC Manning. So, to
5 determine that, we didn't have to review all the--or perform
6 classification reviews on the charged documents.

7 Q. So you moved forward?

8 A. We moved on with the 706.

9 Q. Yes, sir. So, sir, did you act on this defense request--
10 this 26 August defense request?

11 A. I believe I did, yes.

12 Q. Okay, sir, so what steps that were taken to ensure that
13 classified information was protected?

14 A. Well, I issued a protective order on any classified
15 information that was going to be revealed during the 706 board or
16 throughout the conduct of the entire investigation to make sure if
17 something was classified and it came up that protected it properly.

18 Q. Okay, sir. So, let's first talk about that protective
19 order. Can you please turn to pages 30 through 34 of tab 1?
20 [The witness did as directed.]

21 A. Okay.

22 Q. Do you recognize this document?

23 A. Yes, it's the protective order.

1 Q. It is a protective order?

2 A. Yes.

3 Q. And what is the date of this protective order?

4 A. 17 September 2010.

5 Q. Did you consult with trial counsel before----

6 A. Yes.

7 Q. So, sir, after you learned--after the defense alleged that
8 the accused would need to discuss TS information, you said that you
9 issued a protective order. What, if anything, else did you do to
10 ensure the classified information was protected?

11 A. Well, we had a good process of getting a security experts
12 as well to, potentially, classify any new information that was to
13 come up during the board to determine whether it was classified or
14 not.

15 Q. Yes, sir. Did you assume that PFC Manning would need to
16 discuss TS information?

17 A. Well, when the defense counsel had proposed that he would
18 earlier--that it was going to be a requirement for him to disclose
19 TS-SCI information during the sanity board.

20 Q. And sir, what step did you take to confirm whether or not
21 the accused would need to discuss TS information?

22 A. Well, that's when we ordered the preliminary classification
23 review.

1 Q. Okay, sir. Could you please turn to page 35 of tab 1?

2 [The witness did as directed.]

3 A. Okay.

4 Q. Do you recognize this document, sir?

5 A. Yes.

6 Q. What is this document?

7 A. This is the memorandum that we're going to conduct the
8 preliminary classification review.

9 Q. Can explain what is a preliminary classification review?

10 A. It's just a review of what, potentially, was going to be
11 discussed during the 706 hearing so we have a general idea of the
12 classification of the documents or the mental impressions of the
13 accused.

14 Q. And why did you think this was necessary?

15 A. Well, we just needed to do a preliminary one to make sure
16 that we continue to secure any classified information that was out
17 there and potentially going to be revealed----

18 Q. Yes, sir.

19 A. To the board members, to the other security experts,
20 defense, and prosecution.

21 Q. So, sir, after the defense alleged that the accused would
22 need to discuss Top-Secret information, why weren't security

1 clearances given at that point? Why did you feel the need to do this
2 preliminary classification review?

3 A. Well, we had a general idea that was going to be a
4 requirement, but we didn't know that was a requirement.

5 Q. So, what factors did you consider?

6 A. Well, security clearance is not--especially a TS-SCI
7 clearance--is not an easy thing to get. It's time consuming and
8 requires a lot of resources.

9 Q. Okay, sir. And did you consult with trial counsel before?

10 A. Yes.

11 Q. Did any party object to this order?

12 A. The defense did.

13 Q. Sir, can you please turn to pages 36 through 38 of tab 1?
14 [The witness did as directed.]

15 A. Okay.

16 Q. Sir, what is the date of this document?

17 A. 18th of September 2010.

18 Q. And who's it from and who's it to?

19 A. It's from the defense counsel to me.

20 Q. And what is this?

21 A. This is the defense's response back to me on the
22 preliminary classification review.

23 Q. And did you consider this response?

1 A. Yes.

2 Q. Sir, can you please turn to pages 39 and 40 of tab 1?

3 [The witness did as directed.]

4 A. Okay.

5 Q. Sir, are you familiar with this document?

6 A. Yes.

7 Q. What is the date of this document?

8 A. 27 September 2010.

9 Q. And what is this document?

10 A. This is my response back to Mr. Coombs on the--that we were

11 going to conduct the preliminary classification review?

12 Q. And did either party respond to this memorandum? To your

13 recollection?

14 A. Not to my immediate recollection, no.

15 Q. Would anything refresh your memory, sir, if either party

16 did?

17 A. If there's a response document up in here.

18 Q. Thank you, sir. Can you please turn to pages 41 through 42

19 of tab 1?

20 [The witness did as directed.]

21 A. Okay.

22 Q. Sir, can you just take a look at this document?

23 [The witness did as directed.]

1 A. It's a defense document dated 28 September 2010 from the
2 defense to me in reference to the preliminary classification review
3 and their input.

4 Q. Yes, sir. So, in this document, what are some of the
5 things that the defense requests?

6 A. The--at this point, I think the defense understood that we
7 were going to conduct a preliminary classification review, so when,
8 you know, there's no longer an argument for the requirement to do
9 that and stated that, you know, because a preliminary classification
10 review is going to happen, they needed to make sure that they
11 understood their obligation to secure classified information and they
12 were taking steps to ensure they could do that.

13 Q. And sir, I'd like to direct you paragraph 2(e). What, if
14 anything, did the defense request to send?

15 A. I believe that because of--we were going to conduct the
16 preliminary classification review and the security information that
17 was, potentially, going to be released, that having a single security
18 expert do the review was going to be time-consuming so they requested
19 a second, additional security expert.

20 Q. And did you act on this?

21 A. Yeah, I granted an additional expert.

22 Q. Sir, can you please turn to page 43 of tab 1?

23 [The witness did as directed.]

1 Q. Sir, please just look at the document and let me know when
2 you're finished, sir.

3 [The witness did as directed.]

4 A. Okay.

5 Q. And what is the date of this document?

6 A. 12th of October 2010.

7 Q. And what is the document?

8 A. It is a memorandum from me to the defense counsel
9 appointing an additional security expert.

10 Q. Sir, what security clearance was required for this expert?

11 A. A TS-SCI.

12 Q. Sir, to your recollection, do you remember when this
13 preliminary classification concluded?

14 A. I don't remember what the exact date is.

15 Q. Is there anything that could refresh your memory?

16 A. I'm sure I would get a report on the classification of the
17 information----

18 Q. Sir, could you please----

19 A. ----from the security experts.

20 Q. Yes, sir. Could you please turn to page 44, tab 1 and just
21 take a look at this document.

22 [The witness did as directed.]

23 A. I recognize this.

1 Q. What is this document?

2 A. This is a document from the two experts to me and the
3 subject is the preliminary classification review of the accused's
4 mental impressions.

5 Q. And what is the date of this document?

6 A. 13 December 2010.

7 Q. And what to do the defense security experts tell you in
8 this document?

9 A. Fundamentally, they confirm that TS-SCI information would
10 be discussed during the 706.

11 Q. So what steps were taken after you learned that the accused
12 would need to discuss TS information?

13 A. Well, we got into the process of getting the board members
14 TS-SCI clearances and determining the location we were going to
15 conduct the 706 board.

16 Q. And were security clearances for defense counsel secured
17 before the 706 was restarted?

18 A. Before it was restarted?

19 Q. Yes, sir.

20 A. For the defense experts, yes.

21 Q. And, sir, is this a typical amount of time to secure a
22 security clearance---a TS security clearance, in your experience?

1 A. Well, a TS-SCI security clearance can take a--I mean,
2 there's a wide range of time it could take. You know, it could take
3 up to a year depending on--it all depends on the individual.

4 Q. Okay, sir. Let's move to the actual reasons why--did you
5 delay this...

6 A. The 706?

7 Q. Yes, sir.

8 A. Well, I gave them extensions on their completion of the
9 706, we didn't delay the 706.

10 Q. And--so let's move to the reasons why you delayed the 706.

11 A. Okay.

12 Q. Did you account for the reasons why you delayed the 706?

13 A. Yes.

14 Q. How did you account for that?

15 A. I memorialized it, here, in documentation.

16 Q. Yes, sir. Sir, if you please--so, sir, you said you
17 memorialized this in the documentation. What type of documents are
18 we talking about?

19 A. Well, there's several that we were--throughout the period
20 of the entire 706 and prior to it getting started, we had
21 memorandums, emails, phone calls that we were having discussion on
22 the 706 the entire time it was happening.

1 Q. So what documents, if any, were produced to memorialize the
2 reasons?

3 A. You talking about December of 2010?

4 Q. Yes, sir.

5 A. I don't have any specific document that--or recall any
6 specific document right off the top of my head.

7 Q. Yes, sir. So you had requests for delay---

8 A. Yes.

9 Q. ----and then approval of delay?

10 A. Yes.

11 Q. What other documents were there over this time to
12 memorialize why you granted the delay?

13 A. Well, we established accounting memorandums.

14 Q. Okay, sir. Can you just--how frequent did you act on these
15 accounting memoranda? Was this a frequent or was it just a one-time?

16 A. Well, we accounted for delays throughout the time prior to
17 the Article 32 with accounting memorandums.

18 Q. Did you consistently act on----

19 A. Typically, about every 30 days.

20 Q. Okay. So, this was in addition to approvals of delay?

21 A. Yes.

22 Q. So the approval of delay was the actual--"This period is
23 delay" and then you had the separate accounting memorandum?

1 A. To discuss why we delay--just to memorialize it across the
2 board.

3 Q. Sir, do you remember when you started acting on these
4 accounting memoranda?

5 A. I don't recall the specific date.

6 Q. Sir, is there anything that would refresh your memory?

7 A. If you got the first accounting memorandum in here, I'm
8 sure it would have the date on it.

9 Q. Thank you, sir. Could you please turn page 45 of tab 1?

10 [The witness did as directed.]

11 A. Okay.

12 Q. 45 and 46, I'm sorry, sir.

13 A. I got it.

14 Q. Okay, sir. And what is this document?

15 A. This is an accounting of excludable delay, dated 12 October
16 2010. It is a memorandum for the record from me.

17 Q. Now, sir, could you please just look at pages 45 through 50
18 of tab 1?

19 [The witness did as directed.]

20 A. Okay.

21 Q. Colonel Coffman, do you recognize these documents?

22 A. Yes, they are the accounting memorandums.

1 Q. And what period of delay did these accounting memorandums
2 cover?

3 A. Well, each one is different. There's not a set, you know,
4 standard 30-day, 14-day, you know, accounting period. They--each
5 accounting memorandum has different time period; it's approximately a
6 month.

7 Q. Fair enough, sir. So, in this first memorandum, page 45 of
8 tab 1, dated 12 October, what period of delay did this memorandum
9 cover?

10 A. This memorandum covered from the 12th of July to the 12th
11 of October.

12 Q. So, sir, why--earlier, you said that you received the case
13 in early August----

14 A. That's correct.

15 Q. But this memorandum accounts for time excluded back in
16 July?

17 A. That's correct.

18 Q. Can you just explain?

19 A. Well, like I said before, when the case came to me, it was
20 already under a delay and the 11 August 2010 memorandum, the defense
21 assumed responsibility for that time period in the delay so we--the--
22 and based on the fact that PFC Manning was moving from Iraq back to
23 the states, that time-period--I just picked that time period of delay

1 up underneath the--in this delay memorandum just to memorialize the
2 entire case.

3 Q. So, in this memorandum, the period of delay was, you said,
4 from July through the date of the memorandum?

5 A. 12 July till 12 October.

6 Q. And sir, what about page 47, the memorandum dated 10
7 November 2010? What period of delay did that cover?

8 A. From 12 October to 10 November.

9 Q. And page 48, sir?

10 A. From 10 November to 17 December.

11 Q. The 17th of December----

12 A. Is the date of the memorandum, correct.

13 Q. And page 49, sir?

14 A. Page 49 covers the period from 17 December to 14 January
15 2011.

16 Q. And then, lastly, page 50?

17 A. From 14 January until the date of the memorandum which is
18 15 February.

19 Q. So, these--so pages 45 through 50 account for the period of
20 delay from mid-July 2010 all the way through 15 February 2011?

21 A. Then 12 July 2010, I believe, until--yeah, that's correct;
22 12 July 2010 until 15 February 2011.

1 Q. Sir, can you turn to--I guess we'll turn to page 45,
2 please, sir, of tab 1, the 12 October 2010 memorandum?

3 [The witness did as directed.]

4 A. 45 of tab 1? Okay.

5 Q. Sir, can you just walk me through these--this memorandum?
6 What is the purpose of the first paragraph? What is the first
7 paragraph?

8 A. It's to provide periodic accounting; that's the description
9 of what's in the memorandum.

10 Q. And then the second paragraph, sir?

11 A. Gives the actual time of excludable delay.

12 Q. And what about the third paragraph?

13 A. The third paragraph is why we--the basis of the delay.

14 Q. And these memoranda were provided to the prosecution?

15 A. Yes, to everybody.

16 Q. Including the defense?

17 A. Yes.

18 Q. In paragraph 3, these were the reasons supporting your
19 decisions to exclude certain periods of time?

20 A. That's correct.

21 Q. So, sir, do you remember when you--after the preliminary
22 classification review was completed in mid-December, you testified
23 that, at that point, security clearances were retrieved because they

1 were necessary. Do you remember when you ordered the sanity board to
2 resume after all of the steps that had been previously taken?

3 A. I don't remember the exact date. I want to say it was the
4 beginning of February.

5 Q. Okay, sir. So, now, I want to just talk about that period
6 of delay from when the 706 was ordered to resume in early February
7 2011 up until the sanity board actually concluded its report. Sir,
8 if you can turn to tab two? Tab two covers this period of delay.
9 And take a look at page 1 through 6, please.

10 [The witness did as directed.]

11 A. Okay.

12 Q. What is the date of this memorandum?

13 A. The 3rd of February.

14 Q. And who's it from and who's it to?

15 A. It is from me to the Chief of Forensic Psychology at Walter
16 Reed.

17 Q. And what is this document?

18 A. It's an order to resume the 706 board--the sanity board on
19 PFC Manning.

20 Q. Sir, I'd like to draw your attention to paragraph 6 on page
21 two of tab two.

22 A. Okay.

1 Q. What special security measures did you request for the
2 sanity board in this?

3 A. Well, the sanity board--the particular instructions were
4 that they had to have a TS-SCI clearance and they had to be read on.
5 They had to acknowledge the protective order for the classified
6 information that--the previous protective order that I had written
7 telling them--you know, reminding them of their requirements to
8 protect classified information and the proper handling of it and
9 discussed that two security experts would be available for them to
10 classify any information that they didn't know what the
11 classification was or if--any information that was revealed.

12 Q. Yes, sir. What about paragraph 6, subparagraph D? What
13 other security measures were required?

14 A. The interview was to be conducted in a SCIF facility.

15 Q. And why did it need to be conducted in a SCIF facility?

16 A. Because if it's TS-SCI information, then the requirement is
17 that it's discussed in a SCIF facility.

18 Q. And, sir, do you remember what the initial suspense for
19 this sanity board was?

20 A. I believe I gave them a month--4 weeks or so.

21 Q. And you said that this memorandum was to the--someone at
22 Walter Reed, is that correct?

23 A. Yes, the Chief of Forensic Psychology.

1 Q. Sir, as your role--you testified earlier that you were the
2 Joint Base Myer-Henderson Hall Commander. In that role were you
3 familiar with the requirements--just general requirements of Walter
4 Reed workload requirement?

5 A. I don't know the particular Walter Reed workload
6 requirements, but I do know that the--it is--they are challenged in
7 the behavior health.

8 Q. And how do you know that?

9 A. I have several--you know, like I said earlier, the
10 battalion--the headquarters battalion that is subordinate to my
11 command is also--consists of individuals whom we pick up in the
12 National Capital Region that come to Walter Reed for accounting
13 purposes that might not meet the requirements of a Wounded Warrior
14 unit--the Warrior Transition Unit, so they come to us and we have
15 several individuals in the battalion that have on-going care--
16 behavioral health care at Walter Reed that we account for and make
17 sure that they are there for their appointments and things as well.

18 Q. And in this memorandum, sir, you testified that you gave
19 about 30 days--about a month to complete the sanity board?

20 A. I recall giving 4 weeks, I believe. [Flipping through
21 papers.] I can find the suspense in here somewhere.

22 Q. It should be paragraph 13, sir----

23 A. Yes.

1 Q. ----on page 6.

2 A. 4 weeks from the date of the memorandum. So it would
3 begin, roughly, the beginning of March.

4 Q. And did the sanity board complete its evaluation----

5 A. No.

6 Q. ----within that suspense?

7 A. No, they did not.

8 Q. Sir, why not? Why did it not?

9 A. Well, they had continued to conduct the interviews and they
10 had some scheduling difficulties amongst the board members and the--
11 to schedule the SCIF facility.

12 Q. So, they report--you gave the suspense of, rough--beginning
13 of March. At that time, were you aware that they weren't going to
14 complete board?

15 A. The trial counsel had--the trial, Major Fein, particularly,
16 updated me about once a week where we were on the case and what was
17 happening throughout the entire case, so, either--usually, he would
18 give me a phone call or, you know, email update me on the case. But,
19 you know, weekly, we would get an update and he let me know that the
20 sanity board members were having a challenge getting their sanity
21 board complete. They had some scheduling difficulties, they had
22 some, like I said, amongst themselves and with the SCIF--trying to
23 schedule the SCIF as well.

1 Q. So you said the trial counsel would provide you updates
2 during this time?

3 A. Yes.

4 Q. And they were letting you know that they weren't going to--
5 the sanity board was not----

6 A. The sanity board was not going to get complete by the 1st
7 of March.

8 Q. And these updates were through emails?

9 A. I did get an email update--copy furnished on an email
10 between the trial counsel and the individual conducting the board.

11 Q. And phone calls, in-person----

12 A. I got a phone call from the trial counsel--from Major Fein,
13 once a week on the case. I can't tell you if that week, you know, or
14 what week in April or March or February we discussed what, but weekly
15 we would update the case on where we were.

16 Q. Sir, do you remember why it was so difficult? You
17 mentioned that the sanity board did not complete its evaluation
18 within the original suspense because it was having difficulty
19 meeting. Do you remember why they were having-----

20 A. Well, a couple of reasons: They had to schedule themselves
21 and they had to schedule a SCIF facility, and I had given them
22 guidance that I preferred that they meet and conduct the sanity

1 board--because we had to do it in a SCIF--to try and do it on after-
2 duty hours or on a weekend.

3 Q. Why did you prefer this evaluation to take place----

4 A. It was a high-visibility case and I just didn't feel the
5 need for PFC Manning to be, you know, exposed to a bunch of media
6 attention and other things on the way to conduct an interview for a
7 sanity board.

8 Q. And what is a--so you preferred on a weekend. Why on a
9 weekend? What does a government facility usually--is it crowded on a
10 weekend, or is it----

11 A. I must have been in DC long on that date, you know, not too
12 many government facilities are crowded during a weekend.

13 Q. Yes, sir.

14 A. It's--typically the best time to be discreet is on a
15 weekend.

16 Q. Yes, sir. So why, again, just to clarify--why, again, was-
17 -did you feel it was necessary to do it with limited exposure to the
18 accused?

19 A. Well, I mean, he's been accused of something and I don't--
20 he doesn't need the media attention or any other attention for that
21 matter.

1 Q. Thank you, sir. So, what happened after the 3 March
2 suspense was not met? You were updated by trial counsel, but what
3 happened after?

4 A. If I recall correctly, they asked for an additional delay.
5 I don't remember exactly what the time period of the delay was, but I
6 remember going back and forth with them a couple of times on when I
7 thought they needed to have it complete because I wanted to move it
8 along, get it going. I gave them an additional suspense and I
9 believe they came back again and asked me for--originally, they asked
10 for the end of the month, I came back and told them they had a week
11 to get it done. We talked further on what the requirements were,
12 they informed me that they had a--one interview left to schedule and
13 they were attempting to get it scheduled in the beginning of April
14 and--the request was they thought they could get it scheduled by--or
15 their information was they could get it scheduled, I believe, by the
16 10th and I believe it actually happened on--I don't remember exactly
17 what day it was, but it was prior to the 10th. So, I went back and
18 forth with them and based on their advice and their professional
19 opinion, I didn't give them the month that they wanted, but I didn't
20 require the week either so I kind of met them half-way.

21 Q. Sir, can you please turn to pages 7 and 8 of tab 2? Again,
22 Appellate Exhibit 376a.

23 [The witness did as directed.]

1 Q. Sir, are you familiar with these documents?

2 A. Yes, these are requests for the extension of the sanity
3 board we just discussed.

4 Q. Requests by whom?

5 A. From the--Dr. Sweda?

6 Q. Who is Dr. Sweda?

7 A. He's the forensic psychiatrist.

8 Q. Did--at any point during this time, did you actually
9 contact Dr. Sweda?

10 A. No.

11 Q. No email correspondence with Dr.----

12 A. I didn't--well, there was email correspondence, but I
13 didn't correspond directly with Dr. Sweda.

14 Q. Why didn't you, sir?

15 A. I didn't feel the requirement to.

16 Q. Can you explain why you didn't feel the need to?

17 A. Well, that's--the trial counsel is working the issue with
18 Dr. Sweda and the trial counsel has the guidance--then that's why you
19 have a staff.

20 Q. Yes, sir. And you were being updated at the same----

21 A. Yes.

22 Q. And some of these emails, Major Fein provided to you?

23 A. Yes.

1 Q. So, sir, did you act on these requests for an extension by
2 the sanity board?

3 A. Yes, like I stated before.

4 Q. Okay. Can you please turn to pages 9 and 10 of tab 2?

5 [The witness did as directed.]

6 A. Okay.

7 Q. What are these documents, sir?

8 A. These are my granting them the extension. The first one
9 was I told them they need to be complete no later than the 16th of
10 April and then they came back on the 15th and put a request--prior to
11 the 15th and on the 15th I granted their request to be complete no
12 later than the 22nd of April.

13 Q. So the updated suspense was 22----

14 A. 22 April.

15 Q. ----April, sir? So, sir, during this time from when--so,
16 you order the sanity board to resume early February, the sanity board
17 concluded its report 22 April. During this time--the sanity board
18 did conclude its report on 22 April?

19 A. I don't know what the exact date was, but----

20 Q. So, during this time, sir, did you account for this period
21 of delay?

22 A. Yes, this was accounted for on a time memorandum as well.

23 Q. Sir, can you please turn to pages 11 and 12 of tab 2?

1 [The witness did as directed.]

2 A. Okay.

3 Q. Sir, are you familiar with these documents?

4 A. Yes, this is the accounting memo.

5 Q. And what is the date of this memorandum?

6 A. The 18th of March.

7 Q. And for what time period did this memorandum cover?

8 A. The 15th of February until the date of the memorandum which

9 is 18 March.

10 Q. And the reasons supporting your decision to delay this

11 period are memorialized in paragraph 3?

12 A. Paragraph 3 is the basis of the delay, that's correct.

13 Q. Sir, I'd like to draw your attention to paragraph 5 of this

14 document. Sir, what, if any, updates were you provided regarding the

15 accused's access to classified information?

16 A. This is--during this particular memorandum, the--we had an

17 inaccurate reflection on a previous memorandum that PFC Manning was

18 granted access to classified information on the 3rd of February.

19 Q. And sir, at this time, had the accused--based on this

20 paragraph, had the accused been given access to classified

21 information?

22 A. 3 February, he had not. I don't know when the exact date

23 was that that actually came to us----

1 Q. Yes, sir.

2 A. ----as being granted.

3 Q. So, sir, during this time, did anyone else require a
4 security clearance, to your recollection?

5 A. Yes, all the--like I said before, all the sanity board
6 members required security clearances. I believe there was a request,
7 as well, for an additional defense expert that required a clearance
8 as well.

9 Q. Colonel Coffman, can you please turn to pages 13 through 15
10 of tab 2 of Appellate Exhibit 376a?

11 [The witness did as directed.]

12 A. Okay.

13 Q. Sir, what is the date of this document?

14 A. 18th of February 2011.

15 Q. And who is this document to and from?

16 A. This document is to me from defense counsel.

17 Q. And what is this document, sir.

18 A. It's a request for the appointment of an expert assistant
19 with expertise in neuropsychology.

20 Q. And did you act on this request?

21 A. Yes.

22 Q. And what level of security clearance was required for this
23 expert?

1 A. TS-SCI.

2 Q. So, sir, you said that during this period of time, you did
3 account for this period of delay until the sanity board completed its
4 report?

5 A. Yes.

6 Q. Sir, if you could please turn to page 16 and 17 of tab 2?
7 [The witness did as directed.]

8 A. Okay.

9 Q. What is the date of this document?

10 A. 22nd of April 2011.

11 Q. And who is it from and to?

12 A. It is--well, it is for the record, but it's from me.

13 Q. And provided to trial counsel?

14 A. Trial counsel and defense counsel, yes.

15 Q. And the reasons supporting your decision to exclude delay--
16 --

17 A. To exclude, yeah.

18 Q. ----are memorialized in paragraph 3?

19 A. That's correct.

20 Q. Sir, if you turn to page 17, I notice--who signed this
21 document?

22 A. Paralegal from Military District of Washington.

23 Q. Can you explain why a paralegal would sign this document?

1 A. Signing the document for a commander with their permission
2 is not unusual if the commander is unavailable to sign it. We had a
3 discussion which--usually during a military VOCO, the document--so
4 you use the term--you make a phone call, you have discussion about
5 the document with trial counsel and then allow him to VOCO the
6 signature of the memorandum.

7 Q. Yes, sir. So, you did approve this----

8 A. Yes.

9 Q. ----you did approve?

10 A. Yes.

11 Q. Okay, sir. So, now, I'd like to focus on the periods of
12 delay--the next period of delay from 22 April, when the sanity board
13 concluded, up until mid-May 2011. What happened after the sanity
14 board completed its report on 22 April?

15 A. The sanity board completed its report and determined that
16 PFC Manning was of sound mind and understood his actions and so we
17 were moving ahead with conducting the Article 32.

18 Q. Were any requests sent to you to delay the proceedings?

19 A. Delay the Article 32?

20 Q. Or delay the Article 32, yes, sir.

21 A. Yes, there were several.

22 Q. Yes, sir.

1 A. I don't remember exactly what dates they were, but there
2 were several requests.

3 Q. Sir, can you please turn to tab 3? Tab 3 will cover this 1
4 month delay. Can you please turn to page one?

5 [The witness did as directed.]

6 A. Okay.

7 Q. Sir, what's the date of this document?

8 A. 25 April 2011.

9 Q. And who is this document to and from?

10 A. The document is to me from the trial counsel.

11 Q. And what is this document?

12 A. It's a request for delay of the Article 32.

13 Q. Sir, can you explain the process for how you consider this
14 request?

15 A. This was a request to delay the Article 32 until we could
16 get the classification authorities to validate the information--
17 whether or not the information in the documents that the accused had
18 potentially release--what the classification of it was and then we
19 also had to have permission from the original classification
20 authorities on the ability to disclose those documents.

21 Q. So what about the process of when you received this
22 request? How did you receive this request?

23 A. I received this request from Major Fein.

1 Q. And what happened--how did you receive the request,
2 generally?

3 A. I don't know exactly--there were several delays and I don't
4 know exactly how--typically, what would happen was he would come in
5 person or it would come via email in a document, I would open the
6 document up, get on the phone with trial counsel. If it came to me
7 via email, I'd talk to the trial counsel over the phone, he'd make
8 his recommendations, I'd discuss it with him, you know, determine
9 what our course of action were and what the potential outcome was,
10 then we'd--you know, I'd make a decision as a commander on whether or
11 not to grant the delay.

12 Q. Did you see input from defense counsel?

13 A. Yes.

14 Q. Sir, can you please turn to page 3 of tab 3?

15 [The witness did as directed.]

16 A. Okay.

17 Q. Are you familiar with this email?

18 A. Yes, it's an email

19 Q. What is it?

20 A. From me to several members--or several people in the "to"
21 and "cc" lines; primarily the trial counsel and defense counsel
22 members.

23 Q. And what did you ask in this?

1 A. I just asked Mr. Coombs if he could provide feedback by the
2 27th of April.

3 Q. Feedback on what, sir?

4 A. On the trial counsel's request for a delay of the Article
5 32.

6 Q. And what is the date of this email?

7 A. It is the 25th of April 2011.

8 Q. Did the defense--to your recollection, did they object to
9 the prosecution--or United States' request for delay?

10 A. Yes, they sent a memorandum, I believe--responded really
11 quickly.

12 Q. Can you please turn to pages 3 and 4 of tab 3?

13 [The witness did as directed.]

14 A. Okay.

15 Q. Are you familiar with this document, sir?

16 A. Yes, this is the defense's response to the 25 April
17 request.

18 Q. And what's the date of this document?

19 A. 26th of April.

20 Q. And did you consult with trial counsel on this request--or
21 this objection?

22 A. Yes.

1 Q. Sir, I'd like to direct you to paragraph 1 of this
2 document; the last sentence.

3 [The witness did as directed.]

4 A. Okay.

5 Q. What did the defense say about the necessity for receiving
6 this information?

7 A. Well, the defense was--indicated that it would be--without
8 information received from the original classification authorities,
9 they would be unable to adequately prepare for the Article 32.

10 Q. And you considered this objection, sir, in making your
11 decision about what--the United States' request for delay?

12 A. Yes.

13 Q. Sir, I'd like to draw your attention to paragraph two,
14 subparagraph A. What else did the defense--what, if anything else,
15 did the defense request?

16 A. At this point, the defense requested, also, that we provide
17 a summary of the information for the relative--for the relevant
18 classified information that we were discussing as opposed to going
19 through a classification review and having the original
20 classification authorities review that. They offered a suggestion of
21 a substitute by having a summary of that information.

22 Q. And did you consider that----

23 A. Yes.

1 Q. ----suggestion? Did you consult with the United--the trial
2 counsel on this?

3 A. Yes.

4 Q. And what was your decision regarding the United States'
5 request for a delay?

6 A. Well, I decided to grant the delay because the
7 classification review and disposition request--it was my opinion that
8 they were required to conduct a thorough Article 32.

9 Q. Sir, could you please turn to page 5 of tab 3?
10 [The witness did as directed.]

11 A. Okay.

12 Q. And, sir, what is this?

13 A. This is a memorandum for distribution that is from me and
14 it approves the request of the trial counsel's delay of the Article
15 32.

16 Q. And who is this document sent to?

17 A. The document was sent to trial counsel and defense counsel
18 and the Article 32 Investigating Officer.

19 Q. And what did you consider in making this determination on
20 29 April 2011?

21 A. Well, you had a substantial amount of classified
22 information that we were going to have to--that we were potentially
23 dealing with as evidence and, based on the type of information it

1 was, there could be information in it that was not classified or
2 that, you know, that was actually classified which is exactly why we
3 ordered--or I determined that the classification review needed to be
4 complete. We needed to validate what the classification of the
5 documents are----

6 Q. And trial counsel was providing you with updates on that,
7 sir?

8 A. Trial counsel was providing updates.

9 Q. And did you consider the defense request--or defense
10 objection to the prosecution's request?

11 A. Yes.

12 Q. Sir, did you later memorialize the reasons for this----

13 A. Yes.

14 Q. ----period of delay? Can you please turn to page 6 of tab
15 3?

16 [The witness did as directed.]

17 A. Okay.

18 Q. Sir, what is this document?

19 A. This is a memorandum for the record from me, dated the 12th
20 of May 2011. The subject is the accounting of the excludable delay--
21 or accounting for the excludable delay.

22 Q. Sir, I think I forgot to ask you just one quick question.
23 Could you go back to page 5 of tab 3? I apologize.

1 [The witness did as directed.]

2 Q. Paragraph 3, after receiving the defense's objection, what
3 did you do to make sure that evidence was turned over as soon as
4 possible to the defense?

5 A. Well, as we were completing the classification reviews or,
6 in the event that we didn't have any--or we had information that
7 could be disclosed to the defense, I told them that they needed to
8 ensure--and reminded them to provide the information to the defense.

9 Q. Yes, sir. So, now, back to page 6 of tab 3. So you said
10 this was the accounting memorandum?

11 A. This is it--yes, this is the accounting memorandum.

12 Q. And paragraph 3?

13 A. Is the basis for the delay.

14 Q. And was trial counsel providing you with updates on these
15 basis for delay?

16 A. Yes.

17 Q. And, again, just how often were they providing you these
18 updates?

19 A. I was getting updated weekly from trial counsel.

20 Q. Through email, phone----

21 A. Email, phone call.

22 Q. ----in-person?

23 A. Or in-person.

1 Q. At your office?

2 A. Typically, at my office or, in the event that I would
3 happen to be at Fort McNair and executing some other duties, I would
4 frequently stop by the SJA Office and make the rounds, so to speak.

5 Q. But they'd just provide you with these updates during
6 normal business hours?

7 A. They could if I--like I was there during normal business
8 hours and I stopped by--if I happened to be at Fort McNair, I'd stop
9 by looking for an update, yeah.

10 Q. What about after normal business hours?

11 A. After normal business hours, it came on Blackberry--
12 typically a Blackberry call.

13 Q. On the weekends as well, I assume, sir?

14 A. Weekends, leave, TDY.

15 Q. So, sir, in this accounting memorandum dated 12 May 2011,
16 is a basis for your delay, you indicate security clearances. They're
17 still a basis for your delay?

18 A. Yes.

19 Q. Who else--to your recollection, who else needed a security
20 clearance?

21 A. Well, every time we had an adjustment in a team member or
22 an additional expert appointed, that required us to get security
23 clearances.

1 Q. Sir, can you please turn to page 7 of tab 3?
2 [The witness did as directed.]
3 A. Okay.
4 Q. Are you familiar with this document?
5 A. Yes.
6 Q. And who is it from and who is it to?
7 A. It's from the defense counsel. The date, here, is 20 April
8 2011; it's to me.
9 Q. And what is it, sir?
10 A. It's a request for the appointment of a neuro psychologist.
11 Q. And did you act on that request?
12 A. Yes.
13 Q. And what level of security clearance was required for that?
14 A. It would have been a TS-SCI.
15 Q. Okay, sir. Now, I'd like to move to the next period of
16 delay. What happened after the initial approval of delay almost met
17 its suspense date? What happened after that period almost expired?
18 A. After the initial approved delay?
19 Q. Correct, sir.
20 A. Well, we--the trial counsel came to me and requested an
21 additional delay.
22 Q. Sir, could you please turn to page 1 of tab 4?
23 [The witness did as directed.]

1 Q. Are you familiar with this document, sir?

2 A. Yes.

3 Q. What is this document?

4 A. This is a request from the trial counsel to me to delay the
5 Article 32.

6 Q. And what is date of the document?

7 A. 22nd of May.

8 Q. Sir, I'd like to direct you to paragraph two of this
9 document. Did you consider these updates in making your decision
10 about whether or not----

11 A. Yes.

12 Q. What other type of updates did the prosecution provide you
13 during this time? Are these the only updates in this memorandum?

14 A. No, like I said, we talked, you know, at least once a week.

15 Q. So, sir, after you received this request from the
16 prosecution, did you, generally, follow the same process of reviewing
17 the request?

18 A. We reviewed the request, just like I said, if it came--you
19 know, typically, this request would come--Major Fein would bring it
20 to me in-person or he would send it to me via email, I would print
21 it, go back to my desk, sit down, and pick up the phone or he would
22 schedule the time through the admin assistant.

1 Q. Okay, sir. After you had an opportunity to discuss it with
2 the trial counsel, what, generally, did you do at that point?

3 A. Well, typically, what would happen after I had a discussion
4 with the trial counsel, I would send it to the defense and ask the
5 defense's opinion on the delay.

6 Q. Sir, can you please turn to page 2 of tab 4?

7 [The witness did as directed.]

8 Q. What is this document, sir?

9 A. It's exactly what I just said: it's an email to Mr. Coombs
10 asking him to provide me any comments.

11 Q. And the date of this email?

12 A. It's the 24th of May.

13 Q. Did the defense object to the United States' request for a
14 delay at this period?

15 A. Yes.

16 Q. Sir, can you please turn to page 3 of tab 4?

17 [The witness did as directed.]

18 Q. Are you familiar with this document?

19 A. Yes.

20 Q. And what is the date of the document?

21 A. This is an email dated the 24th of May, again.

22 Q. And who's it from and to?

1 A. It's from Mr. Coombs to me. It's--restates the position of
2 the 26th April document that they sent--their opinion on the delay--
3 the initial delay that I granted.

4 Q. And did you consider that 26 April 2011----

5 A. I considered that and what he's providing here.

6 Q. Yes, sir. And you consulted with--did you consult with
7 trial counsel about----

8 A. Yes.

9 Q. And, sir, what was your decision regarding the United
10 States' request during this period?

11 A. I granted it.

12 Q. Sir, if you could just turn to page 4, tab 4?

13 [The witness did as directed.]

14 A. Okay.

15 Q. Sir, what is this document?

16 A. This is the document where I granted the delay; approved
17 it.

18 Q. Yes, sir. And what is the date of the document?

19 A. 26th of May.

20 Q. And what did you consider in approving this delay? What
21 documents did you consider?

1 A. Well, it's what I just stated. Didn't we just have that
2 discussion? The discussion with trial counsel, the email response
3 from the defense counsel, and that--his 26 April memorandum.

4 Q. And you considered the facts and circumstances of this
5 case?

6 A. Yes.

7 Q. Sir, did you later memorialize the reasons why you granted
8 this delay?

9 A. We memorialized all of the delay that we had--or that I
10 approved.

11 Q. Can you please turn to page 5 of tab 4?

12 [The witness did as directed.]

13 Q. Is this that accounting memorandum you're speaking about?

14 A. This is the accounting memorandum.

15 Q. Okay. And paragraph 3, that's the basis for your decision?

16 A. That's correct.

17 Q. And the trial counsel provided you with updates on these
18 bases?

19 A. Yes.

20 Q. And, again, just how often, generally, did they provide
21 you----

22 A. Like I said, we discussed the case once a week.

1 Q. Okay, sir. And what period of time did this accounting
2 memorandum account for?

3 A. This accounting memorandum covered from the 12th of May to
4 the 17th of June.

5 Q. Sir, now, I'd like to just talk about this--the next period
6 of delay. What happened after the initial delay was close to its
7 suspense?

8 CDC[MR. COOMBS]: Ma'am, if we could, before we go into this
9 next period, could we have a brief comfort break?

10 MJ: Certainly. How long would you like? 10 minutes?

11 CDC[MR. COOMBS]: That would be fine ma'am.

12 MJ: Any objection?

13 TC[MAJ FEIN]: No, ma'am.

14 MJ: All right.

15 **[The witness was duly warned and the Article 39(a) session recessed**
16 **at 0952, 8 November 2012.]**

17 **[The Article 39(a) session was called to order at 1005, 8 November**
18 **2012.]**

19 MJ: This Article 39(a) session is called to order. Let the
20 record reflect all parties present when the Court last recessed are
21 again present in court. The witness is on the witness stand.
22 Proceed.

23 **[Direct examination of Colonel Coffman continued.]**

1 Q. Colonel Coffman, where we left off was the period of delay
2 between mid-June to mid-July. After the previous period excluded
3 delay was near its suspense, what happened?

4 A. The trial counsel requested an additional delay.

5 Q. Sir, could you please turn to page 1 of tab 5? Page 1 and
6 2, sir.

7 [The witness did as directed.]

8 A. Okay.

9 Q. Do you recognize this document?

10 A. Yes.

11 Q. What's the date of this document?

12 A. 27th of June 2011.

13 Q. And who's the document to and from?

14 A. The document is to me and it's from Major Fein, the trial
15 counsel.

16 Q. Colonel Coffman, what is this document?

17 A. It's a request for a delay of the Article 32.

18 Q. Sir, I'd like to draw your attention to paragraph two of
19 this document.

20 A. Okay.

21 Q. Did you consider these updates in making your determination
22 of whether or not to approve this request?

23 A. Yes.

1 Q. Was trial counsel providing you with---

2 A. The trial counsel provided updates.

3 Q. And, sir, what did you do after receiving this request?

4 A. Very similar to the other delays, it came from me--to me

5 from the trial counsel requesting delay, I got his opinion and

6 discussed it, then sent it to defense counsel for their input.

7 Q. Can you please turn to page 3 of tab 5?

8 [The witness did as directed.]

9 Q. What is this document?

10 A. Page 3 is just--I'm asking Mr. Coombs if he has any

11 comments on the request.

12 Q. So, this document is from you to the defense?

13 A. Yes.

14 Q. And have any objections--objections to what request, sir?

15 You mentioned----

16 A. The Article 32--that trial counsel had just requested--the

17 delay in the Article 32 that trial counsel had just requested.

18 Q. And did defense object, to your recollection?

19 A. Yes.

20 Q. Okay, sir. Can you please turn to page 4 of tab 5?

21 [The witness did as directed.]

22 Q. Are you familiar with this document?

1 A. Yes, this is the email from Mr. Coombs telling me that he
2 maintains his position as stated in the 26 April 2011 memorandum and
3 that the defense request that delay be accredited to the government.

4 Q. And what's the date of this email?

5 A. It is the 29th of June 2011.

6 Q. and how did you act on the United States' request for a
7 delay for this period?

8 A. I granted the delay.

9 Q. Can you please turn to page 5 of tab 5?

10 [The witness did as directed.]

11 Q. Are you familiar with this document, Colonel Coffman?

12 A. Yes.

13 Q. What is this document?

14 A. This is my document granting the request of the trial
15 counsel to delay the Article 32.

16 Q. And what's the date of the document?

17 A. The 5th of July 2011.

18 Q. And, again, just what did you consider in making this
19 determination to approve the period of delay?

20 A. The same considerations as the previous documents,
21 primarily the classification reviews that we had outstanding, the
22 request--disclosure requests we had to get back from the OCAs, the
23 security clearances and securing the security clearances for defense

1 witnesses and experts as well as if there are any potential
2 prosecution team members. I don't recall exactly if we had any
3 changes in the--or additions to the prosecution team at this time.

4 Q. Did you consider updates that the prosecution team was
5 providing you on----

6 A. Yes.

7 Q. ----during this period?

8 A. Yeah, we started getting initial updates, I believe, from
9 the OCAs about, I want to say, March if I recall correctly. But,
10 yeah, we were getting updates on where the OCAs were with their
11 classification reviews.

12 Q. And you considered this progress in making your
13 determination?

14 A. Yes.

15 Q. And did you account for this period of delay, sir--the
16 reasons?

17 A. Yes.

18 Q. Can you please turn to page 6 of tab 5?

19 [The witness did as directed.]

20 Q. Sir, are you familiar with that document?

21 A. I am familiar with it; I signed it.

22 Q. And what is the date?

23 A. It is the 13th of July 2011.

1 Q. And what is the document?

2 A. It is the document accounting for the delay period from 17

3 June until the date of this memorandum.

4 Q. And what is included in paragraph 3 of----

5 A. The reasons that I delayed.

6 Q. Sir, I'd like to just move forward to the next period of

7 delay. So what happened after the previous approved delay was near

8 its suspense date?

9 A. Well, once the previous delay was near its suspense date,

10 the trial counsel submitted an additional delay request to delay the

11 Article 32.

12 Q. Can you please turn to pages 1 and 2 of tab 6?

13 [The witness did as directed.]

14 A. Okay.

15 Q. What is this document, sir?

16 A. This is a document requesting a delay of the Article 32

17 investigation; it is from trial counsel.

18 Q. Is it to you, sir?

19 A. It is to me.

20 Q. I'd like to draw your attention just to paragraph two of

21 this document.

22 A. Okay.

1 Q. Did you consider these updates in making your
2 determination?

3 A. Yes.

4 Q. Were these the only updates the prosecution team provided
5 you?

6 A. It was the updates I was getting, as well, from Major Fein
7 in our weekly phone calls.

8 Q. And did the defense object to this request?

9 A. Yes.

10 Q. Sir, can you please turn to page 3 of tab 6.
11 [The witness did as directed.]

12 Q. Are you familiar with this email?

13 A. I am.

14 Q. What's the date of the email?

15 A. the date of the email is the 25th of July 2011.

16 Q. And what is this email?

17 A. It is an email from me to the defense asking them if they
18 have any other issues with the--their opinion on the Article 32
19 delay.

20 Q. Did the defense object to this period of delay?

21 A. Yes.

22 Q. Please turn to page 4 of tab 6.
23 [The witness did as directed.]

1 Q. What is this document?

2 A. This is a document for me from defense counsel. It's their
3 opinion on--or their issues with the delay in the Article 32.

4 Q. Okay, sir. If you please--did you act on the United
5 States' request to delay this period?

6 A. Yes.

7 Q. How did you act?

8 A. I granted the delay.

9 Q. Sir, if you could please turn to page 5 of tab 6.
10 [The witness did as directed.]

11 A. Okay.

12 Q. Sir, what is this document?

13 A. This is my response to the requested--trial counsel's delay
14 of the Article 32.

15 Q. And what did you consider in approving this period of
16 delay?

17 A. Very similar to the previous delays, we were still waiting
18 for information from the original classification authorities and
19 validations to come back, disclosure requests, and any other security
20 clearance issues that we have on-going.

21 Q. Sir, did you consider updates provided to you by the
22 prosecution?

23 A. And--roger.

1 Q. Did you consider the defense objection?
2 A. I did.
3 Q. And, sir, did you notify the parties of your decision,
4 here, on 26 July 2011?
5 A. Yes.
6 Q. And did you later memorialize the reasons supporting your
7 decision?
8 A. Yes, we memorialized it in an accounting memorandum.
9 Q. Sir, can you please turn tab 6, page 6?
10 [The witness did as directed.]
11 Q. What is that document?
12 A. This is the accounting memorandum dated 10 August.
13 Q. Okay, sir. I'd like to just draw your attention to
14 paragraph 3 one more time. What is paragraph 3?
15 A. Paragraph 3 is the basis of--describes the basis delay
16 considerations--the considerations that I used in making the
17 determination to delay the Article 32.
18 Q. And, notice in subparagraph D, you list security
19 clearances.
20 A. Yes.
21 Q. To your recollection, who else needed security clearances
22 in this case?

1 A. I'm not sure exactly who, at any one particular time,
2 whether it was this time or another delay period, but throughout this
3 period of time, we had changes in experts that required security
4 clearances.

5 Q. Would anything refresh your memory of who needed a security
6 clearance during this time?

7 A. If there was a request for that security clearance in here
8 somewhere, I'm sure--or a request for a defense expert.

9 Q. Okay, sir. Can you please turn to pages 7 and 8 of tab 6?
10 [The witness did as directed.]

11 A. I'm familiar with this.

12 Q. Okay, what's the date of the document?

13 A. This document is dated 3 August.

14 Q. And what--who is the document to and from?

15 A. The document is through the SJA's Office to me from the
16 defense counsel.

17 Q. And what is the document?

18 A. It's a request for an appointment of a particular
19 individual to assist the defense in the case.

20 Q. Did you consult with trial counsel on this request?

21 A. I did.

22 Q. And what was your decision?

23 A. I didn't--it was granted with a caveat, so to speak.

1 Q. Can you explain what you mean, sir?

2 A. Well, they were requesting an individual--a particular
3 individual as the defense expert and I granted an expert with the
4 same skill set, not just that particular individual.

5 Q. Sir, can you please turn to tab 6, pages 9 through 13?

6 [The witness did as directed.]

7 A. Okay.

8 Q. Are you familiar with the document on page 9 of tab 6?

9 A. Yes, this is the appointment memo of the requested defense
10 expert.

11 Q. And what is the date of the document?

12 A. The 10th of August 2011.

13 Q. To your recollection, was anyone else--were any other
14 security clearances required during this time?

15 A. Other than the individual that we just appointed?

16 Q. Yes, sir.

17 A. I'm not--like I said, I don't remember from one month to
18 the other. As team members changed and we brought other experts on,
19 I don't know which particular weeks they showed up or what month it
20 was, but it was all memorialized.

21 Q. Sir, can you please turn to pages 14 through 17 of tab 6?

22 [The witness did as directed.]

23 A. Okay.

1 Q. Sir, are you familiar with this document?
2 A. Yes.
3 Q. What's the date of the document?
4 A. 9 August 2011.
5 Q. And who is this document to and from?
6 A. The document is to me from defense counsel.
7 Q. And what is the document?
8 A. It's a request for computer forensic experts to assist the
9 defense.
10 Q. And did you act on this?
11 A. Yes.
12 Q. What level of security clearances were required?
13 A. TS-SCI.
14 Q. So, sir, during this time, what updates were provided to
15 you on the status of this case?
16 A. Like I said before, I continued to get updates weekly from
17 trial counsel.
18 Q. Sir, can you please turn to pages 19 through 22 of tab 6?
19 Just read those pages, please, sir.
20 [The witness did as directed.]
21 A. Okay. 19 through 26?
22 Q. Through--I'm sorry, sir, through 22.
23 A. Through 22? All right. Okay.

1 Q. So, sir, first pages 19 through 20, what is this?

2 A. It's an email exchange between trial counsel and defense

3 updating--looks like trial counsel is updating the defense on

4 information that's being disclosed to him.

5 Q. Sir, just to clarify, who is this email to and from?

6 A. The email is from, then-Captain Fein to--depends on which

7 exchange you're looking at. It's either to me or to the defense

8 counsel, Mr. Coombs.

9 Q. So, sir, on page 19, the first email?

10 A. The first email is from Major Fein to me.

11 Q. And he forwarded you the subsequent email?

12 A. Forwarded me the subsequent email, right.

13 Q. And what was that subsequent email, sir?

14 A. It says the email is from Mr. Coombs to Ashden.

15 Q. And the following email?

16 A. The email following that is an email from Major Fein to Mr.

17 Coombs expressing to him what they were sent in discovery.

18 Q. And what's the date of that email?

19 A. The email is the 2nd of August 2011.

20 Q. Okay, sir. Now, with pages 21--or actually just page 21,

21 sir.

22 A. Okay.

23 Q. Are you familiar with this email?

1 A. Yes.

2 Q. What is--who is this email from and to?

3 A. It's from the trial counsel, Major Fein, to me.

4 Q. And what's the date of this email?

5 A. It is the 9th of August 2011.

6 Q. And what is this email?

7 A. This email is just forwarding me an email he had sent Mr.

8 Coombs describing what he had sent to him in discovery--updating him

9 on discovery items.

10 Q. And what's the date of the email?

11 A. The 9th of August.

12 Q. Sir, can you please turn to page 22 of tab 6?

13 [The witness did as directed.]

14 Q. Are you familiar with this email?

15 A. Yes.

16 Q. What is this email?

17 A. It's an additional email forwarded from Major Fein to me

18 and the subsequent email is, I assume the previous email that was

19 sent that was forwarded to me is an email from the trial counsel to

20 the defense counsel on an update on discovery items that was sent to

21 them.

22 Q. So, sir, you were updated on the status of discovery in

23 this case?

1 A. Yes.

2 Q. Okay. And what documents were being provided to the----

3 A. What was being provided to the defense, that's correct.

4 Q. And, sir, earlier you testified you had approximately half
5 a dozen courts-martial under your belt. On any of those other cases
6 have you been updated when documents are transferred from trial
7 counsel to defense?

8 A. No.

9 Q. Sir, to your recollection, what other requests were made
10 during this time that required government action?

11 A. It was primarily requests for additional defense experts or
12 I believe one memorandum--there was a request that--I believe Mr.
13 Coombs reiterated his request to ensure that the discovery items were
14 provided to them as classification reviews were complete and
15 disclosure requests were completed he be provided that information.

16 Q. Yes, sir. Do you remember any other requests from the
17 defense during this period of time?

18 A. No in particular, no.

19 Q. Sir, would anything refresh your memory?

20 A. I'm sure if there is a document granting--or asking for a
21 particular item, I'd--if the request was sent from me, I looked at
22 it.

1 Q. Okay, sir. Can you please turn to pages 23 and 24 of tab
2 6?
3 [The witness did as directed.]
4 A. Yeah.
5 Q. Yes, sir. What's the date of this?
6 A. This is the 6th of August.
7 Q. And who is this document to and from?
8 A. The document is to me from the defense counsel.
9 Q. And what is this?
10 A. It's a request for computer hardware and software.
11 Q. And, sir, did you act on this request?
12 A. Yes.
13 Q. Can you please turn to page 25 of tab 6?
14 [The witness did as directed.]
15 A. This is my approval for the previous requests.
16 Q. Thank you, sir. Okay, sir, so now, let's move forward to
17 the next period of delay from mid-August to mid-September. After the
18 previous period of delay was near its suspense, what happened?
19 A. The trial counsel requested an additional delay in the
20 Article 32.
21 Q. Okay, sir. Can you please turn to pages 1 and 2 of tab 7?
22 [The witness did as directed.]
23 A. Okay

1 Q. What's the date of this document?

2 A. The date of this document is the 25th of August 2011.

3 Q. And what is this document?

4 A. This document is a request from the trial counsel to delay
5 the Article 32.

6 Q. To you, sir? Is the document----

7 A. Yes, it's to me.

8 Q. And, sir, I'd just like to draw your attention to paragraph
9 2. Did you consider these updates in making your determination on
10 this request?

11 A. Yes.

12 Q. And, sir, did the defense object to this request, to your
13 recollection?

14 A. Yes.

15 Q. Sir, can you please turn to page 3 of tab 7?
16 [The witness did as directed.]

17 Q. What is this document?

18 A. This is--just as in the previous delays and the process
19 that we use, I sent Mr. Coombs an email asking if he had any issues
20 with the additional delay.

21 Q. And did the defense?

22 A. Yes, he responded.

23 Q. Sir, can you please turn to page 4 of tab 7?

1 [The witness did as directed.]

2 Q. Are you familiar with this email?

3 A. Yes.

4 Q. What is this email?

5 A. This email is from Mr. Coombs to me. He maintained his
6 previous position that additional delay should not be excluded and it
7 should be credited to the government.

8 Q. And did you consider this objection in making your
9 determination on this request?

10 A. Yes.

11 Q. And do you recall how you acted on it?

12 A. I granted the request for the delay.

13 Q. Sir, can you please turn to page 5 of tab 7?

14 [The witness did as directed.]

15 Q. Are you familiar with this document?

16 A. I signed it. It's the--granting the Article 32 delay.

17 Q. And what is the date of the document?

18 A. It's the 29th of August.

19 Q. And did you consult with trial counsel before approving
20 this delay?

21 A. Yes.

22 Q. What did you consider in----

1 A. Well, the continuous updates we were getting and the weekly
2 conversations we had on the case, the defense's response to the
3 request that I sent him, you know, his response back, and the
4 additional delay request--Article 32 delay request submitted by trial
5 counsel.

6 Q. And who did you notify of your decision?

7 A. The investigating officer, trial counsel, defense counsel
8 were all notified.

9 Q. And did you, later, memorialize the reasons for----

10 A. Yes, in an accounting memorandum.

11 Q. Sir, can you please turn to page 6 of tab 7?

12 [The witness did as directed.]

13 Q. Are you familiar with this document?

14 A. Yes.

15 Q. What's the date of the document, sir?

16 A. The 15th of September 2011.

17 Q. And what is this document?

18 A. This is an accounting memorandum for the delay from the
19 time-period of the 10th of August until the day of this memorandum.

20 Q. And what is--what's paragraph 3, sir?

21 A. Paragraph 3 is the basis for the delay.

22 Q. Okay, sir. So, during this time, were you provided updates
23 on these different bases?

1 A. Absolutely.

2 Q. Okay, sir. Can you please turn to page 7 of tab 7?

3 [The witness did as directed.]

4 A. Okay.

5 Q. Sir, what is this document?

6 A. This is an email document from--similar to the previous
7 one--from trial counsel to me offering me situation awareness on
8 what--an email he had just previously sent to the defense--it was
9 from him to the defense on a discovery update.

10 Q. And what's the date of the email from Major Fein to the
11 defense?

12 A. It is the 1st of September.

13 Q. Okay, sir. So now, let's talk about the next period of
14 delay from mid-September to mid-October. What happened as the
15 previous period of delay was near its suspense?

16 A. I got an additional request for delay.

17 Q. Sir, can you please turn to pages 1 and 2 of tab 8?

18 [The witness did as directed.]

19 A. Okay.

20 Q. Are you familiar with this document, sir?

21 A. Yes.

22 Q. What's the date of the document?

23 A. 26 September 2011.

1 Q. And, sir, who is it to and from?

2 A. It is to me from the trial counsel.

3 Q. Okay. And what is the document?

4 A. It is a request for delay of Article 32.

5 Q. Sir, I'd like to draw your attention to paragraph 2. Did
6 you consider these updates in making your determination?

7 A. That's correct.

8 Q. Were these the only updates you were receiving during this
9 time?

10 A. I received--like I said before, we talked on a weekly basis
11 about where we were on the classification review and disclosure
12 request, among other things, and then, as done in the previous
13 requests, I asked defense for their opinions on the delay of the
14 Article 32 as well.

15 Q. And, sir, did the defense object to this period of delay?

16 A. Yes.

17 Q. Sir, can you please turn to page 3 of tab 8?

18 [The witness did as directed.]

19 Q. Are you familiar this email?

20 A. This is the email from Mr. Coombs to me, maintaining his
21 previous position that any additional delay should not be excluded
22 and it should be credited to the government.

23 Q. And did you consider this objection?

1 A. Yes.

2 Q. And, sir, what was your determination on the government's
3 request for delay?

4 A. I granted the delay.

5 Q. Can you please turn to page 4 of tab 8?

6 [The witness did as directed.]

7 Q. Sir, what is this document?

8 A. This is a request to delay the Article 32.

9 Q. Actually, sir, on page 4 of tab 8.

10 A. I'm looking at tab 8, page 4. It is--actually, it's the
11 approval memorandum, so I approved the delay--the previous requested
12 Article 32 delay.

13 Q. Yes, sir. And what did you consider in making this
14 determination?

15 A. The previous document received in the request, weekly
16 updates I was receiving from the trial counsel, and the defense's
17 objection emailed back to me.

18 Q. And after reviewing the defense objection, what, if
19 anything, did you do to make sure that evidence was turned over to
20 the defense as soon as possible?

21 A. Well, in our accounting memorandums, we would reinforce the
22 fact that we need to ensure that any disclosure--discovery
23 information that we could provide to the defense was provided.

1 Q. And you did account for this period of delay?
2 A. We did.
3 Q. Can you please turn to page 5 of tab 8?
4 [The witness did as directed.]
5 Q. Do you recognize this document?
6 A. Yes.
7 Q. Sir, what is this document?
8 A. This is the accounting memorandum.
9 Q. And what is the date of the document?
10 A. It's dated 14 October. It accounts for the period of 15
11 September through 14 October.
12 Q. And in paragraph 3, what are--what is paragraph 3?
13 A. It is the basis of the delay.
14 Q. Sir, you said during this time, trial counsel was providing
15 you updates?
16 A. Yes.
17 Q. Sir, can you please turn to page 6 and 7 of tab 8?
18 [The witness did as directed.]
19 Q. Are you familiar with these documents?
20 A. Yes.
21 Q. What are these documents, sir?
22 A. These are--similar to the previous documents, these are
23 Major Fein's forwarding emails that he had sent to the defense

1 counsel on--that they had produced as discovery items. So, he just
2 gave me an update on the fact that he was providing information as he
3 got the information or as the discovery came back, that we provided
4 it to the defense. He was just keeping me updated on the fact that
5 he was providing that information.

6 Q. Sir, what were the dates on these emails from trial counsel
7 to defense?

8 A. From trial counsel to defense, the first one was the 13th
9 of October and the second one was the 21st of October.

10 Q. Sir, to your recollection, were there any other defense
11 requests during this time?

12 A. During this particular time?

13 Q. Yes, sir.

14 A. What time period was this? As we closed in on some--I
15 don't know if it was this period or November, I want to say we had an
16 additional request for a defense expert.

17 Q. Yes, sir. Any other requests that you can--I know it was
18 over a year ago, but anything else?

19 A. It's been a long while. The--I don't recall specifically
20 what, during this time period--what the defense requested,
21 specifically.

22 Q. Sir, is there anything----

INSTRUCTIONS FOR PREPARING AND ARRANGING RECORD OF TRIAL

USE OF FORM - Use this form and MCM, 1984, Appendix 14, will be used by the trial counsel and the reporter as a guide to the preparation of the record of trial in general and special court-martial cases in which a verbatim record is prepared. Air Force uses this form and departmental instructions as a guide to the preparation of the record of trial in general and special court-martial cases in which a summarized record is authorized.

Army and Navy use DD Form 491 for records of trial in general and special court-martial cases in which a summarized record is authorized. Inapplicable words of the printed text will be deleted.

COPIES - See MCM, 1984, RCM 1103(g). The convening authority may direct the preparation of additional copies.

ARRANGEMENT - When forwarded to the appropriate Judge Advocate General or for judge advocate review pursuant to Article 64(a), the record will be arranged and bound with allied papers in the sequence indicated below. Trial counsel is responsible for arranging the record as indicated, except that items 6, 7, and 15e will be inserted by the convening or reviewing authority, as appropriate, and items 10 and 14 will be inserted by either trial counsel or the convening or reviewing authority, whichever has custody of them.

1. Front cover and inside front cover (chronology sheet) of DD Form 490.
2. Judge advocate's review pursuant to Article 64(a), if any.
3. Request of accused for appellate defense counsel, or waiver/withdrawal of appellate rights, if applicable.
4. Briefs of counsel submitted after trial, if any (Article 38(c)).
5. DD Form 494, "Court-Martial Data Sheet."
6. Court-martial orders promulgating the result of trial as to each accused, in 10 copies when the record is verbatim and in 4 copies when it is summarized.
7. When required, signed recommendation of staff judge advocate or legal officer, in duplicate, together with all clemency papers, including clemency recommendations by court members.

8. Matters submitted by the accused pursuant to Article 60 (MCM, 1984, RCM 1105).

9. DD Form 458, "Charge Sheet" (unless included at the point of arraignment in the record).

10. Congressional inquiries and replies, if any.

11. DD Form 457, "Investigating Officer's Report," pursuant to Article 32, if such investigation was conducted, followed by any other papers which accompanied the charges when referred for trial, unless included in the record of trial proper.

12. Advice of staff judge advocate or legal officer, when prepared pursuant to Article 34 or otherwise.

13. Requests by counsel and action of the convening authority taken thereon (e.g., requests concerning delay, witnesses and depositions).

14. Records of former trials.

15. Record of trial in the following order:

- a. Errata sheet, if any.
- b. Index sheet with reverse side containing receipt of accused or defense counsel for copy of record or certificate in lieu of receipt.
- c. Record of proceedings in court, including Article 39(a) sessions, if any.
- d. Authentication sheet, followed by certificate of correction, if any.
- e. Action of convening authority and, if appropriate, action of officer exercising general court-martial jurisdiction.
- f. Exhibits admitted in evidence.
- g. Exhibits not received in evidence. The page of the record of trial where each exhibit was offered and rejected will be noted on the front of each exhibit.
- h. Appellate exhibits, such as proposed instructions, written offers of proof or preliminary evidence (real or documentary), and briefs of counsel submitted at trial.